SUPREME COURT, U.S.
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No. _____

In the Supreme Court of the United States

WOLGAST CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the National Labor Relations Board and the Sixth Circuit Court of Appeals erred and created a split of authority in the Courts of Appeals based upon an uncertain distinction between "organizational" and "representational" union rights for purposes of granting access to employees working on an employer's private property in contravention to this Court's rule of Lechmere v. NLRB, 502 U.S. 527 (1992).

II. Whether the National Labor Relations Board and the Sixth Circuit Court of Appeals erred and created a split of authority in the Courts of Appeals by forcing an employer to grant union access to its property on the basis of a contractual "union access" agreement between the union and a subcontractor working on the employer's property to which the employer has no privity of contract.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner, Wolgast Corporation, was the Respondent to an unfair labor practice case before the National Labor Relations Board and, subsequently, was the Petitioner-Cross Respondent before the Sixth Circuit Court of Appeals.

Petitioner is a closely held Michigan corporation. Thirty percent (30%) of the shares of stock are held by employees pursuant to an employee stock ownership plan. No corporation owns more than 10% of the stock of Wolgast Corporation.

Respondent is the National Labor Relations Board which brought the underlying unfair labor practice charges against the Petitioner on behalf of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Wolgast Corporation ("Wolgast"), respectfully petitions this Court for a writ of certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on September 16, 2003.

OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals is published and referenced as Wolgast v. National Labor Relations Board, 2003 U.S. App. Lexis 19391 (6th Cir. 2003). (Pet. App. 3a-15a). The decision of the National Labor Relatins Board is reported at 334 N.L.R.B. 203 (2001). (Pet. App. 16a-20a).

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals had appellate jurisdiction from the decision of the National Labor Relations Board pursuant to 29 U.S.C. 160(f). The judgment of the Sixth Circuit Court of Appeals was entered on September 16, 2003. The Petitioner has timely filed this Petition for Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION(S) INVOLVED

This case involves the interpretation and application of the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. 151, *et seq.*, specifically, section 8(a)(1), which provides:

> It shall be an unfair labor practice for an employer -
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7 of the Act].

29 U.S.C. 158(1). Section 7 of the Act provides, in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ... .

29 U.S.C. 157.

STATEMENT OF THE CASE

This case involves the misapplication and misinterpretation by the NLRB and the Sixth Circuit Court of Appeals of this Court's prior decision in Lechmere v. N.L.R.B., 502 U.S. 527 (1992), resulting in conflict and confusion of law among the various circuit courts of appeals. In Lechmere, this Court made clear that an employer may exclude union officials from its property absent a showing by the union that the targeted employees are otherwise inaccessible to the union officials. Nevertheless, pointing to the existence of a "union access" clause in a collective bargaining agreement of a subcontractor working on the job site, the NLRB and the Sixth Circuit Court of Appeals ruled in the present case that Wolgast could not lawfully exclude union officials from its job site. The Board and the Court

concluded that Wolgast "invited" the subcontractor onto the job site and that it was thereafter "not privileged to interfere" with the contractual access rights of the union officials as representatives of the subcontractor's employees working on the job site.

Wolgast contends that the rulings of the Board and the Sixth Circuit ignore this Court's precedent in Lechmere. The Sixth Circuit's decision to affirm the Board's ruling results in a significant split of authority between the federal circuit courts of appeals on an issue of great public importance, i.e., the scope and application of Lechmere. In particular, the NLRB and the Sixth Circuit have created an untenable distinction between "organizational" and "representational" union access rights, a distinction that has been firmly rejected by other courts of appeals. The rulings of the Board and the Sixth Circuit are also in direct conflict with previously settled law regarding the application of collective bargaining agreements to non-party employers.

A. Factual Background

Wolgast is a general contractor engaged in new construction and remodeling in the State of Michigan and neighboring states. On July 29, 1999, Wolgast entered into a contract with Cinema Hollywood, LLC, for the construction of an addition to a movie complex in Birch Run, Michigan. Under the terms of the contract, Wolgast accepted the responsibility not only for the timely and cost-effective completion of the project, but also for any potential damage to persons or property as a result of the construction being performed. Wolgast was also authorized to control access to the property during the period of construction.

Wolgast entered into various subcontracting agreements for the project on the basis of the "lowest and best bidder," without regard to union or non-union status.[1] In this regard, Wolgast entered into a subcontract with Acoustical Arts, Inc. ("Acoustical"), for installation of framing, drywall, insulation and other acoustical materials in the theater complex. Acoustical's employees were represented by two locals of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO ("Carpenters Union"), and were covered by two collective bargaining agreements. Under the union contracts (to which Wolgast was not a party), Acoustical and the Carpenters Union had agreed that officials from the Carpenters Union could visit job sites during work time to conduct union business with employees. (Pet. App. 28a-29a).

On October 13, 1999, union officials from the Carpenters Union visited the job site to "check on" a couple of members and to see how a new member from Acoustical was "getting along." The visit was permitted. However, when the union officials returned the following day and began conducting what they claimed to be "union business" in a work area, a Wolgast supervisor told them they needed to conduct their business in a non-work area due to safety and work progress concerns. The union agents refused to comply and, after a confrontation ensued, ultimately filed an unfair labor practice charge against Wolgast.

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[1] The theater complex was a multi-employer job site, so that a mix of both union and non-union employers were present at any given time.

B. Proceedings Below

The Carpenters Union filed an unfair labor practice charge against Wolgast based upon the company's request that the business officials remove their business to a non-work area of the job site. The union alleged that Wolgast blocked the union officials from access to the job site and that in doing so, Wolgast interfered with, restrained and/or coerced Acoustical's employees in the exercise of their rights in violation of section 8(a)(1) of the NLRA, 29 U.S.C. 151, *et seq*.

A hearing was held before Administrative Law Judge ("ALJ") Martin J. Linsky on March 30 and 31, 2000, and June 13, 2000. At this hearing, the ALJ was required to determine whether Wolgast could deny access to the union officials under its paramount property rights pursuant to this Court's holding in Lechmere. With scant discussion or reasoning, the ALJ ruled flatly against Wolgast as to each issue in the case, including the issue of whether Lechmere applied (Pet. App. 63a-64a).

Upon Wolgast's filing of Exceptions, the NLRB failed to reverse the ALJ's erroneous Decision and Order and, instead, merely adopted the majority of the Judge's Decision as its own (Pet. App. 19a-20a). In essence, both the ALJ and the Board followed the 1992 case of CDK Contracting, 308 N.L.R.B. 1117 (1992), in which the Board previously held Lechmere inapplicable to circumstances where union officials seek access to private job sites through use of contractual "union access" clauses with subcontractors working on the project sites. According to the Board, Wolgast was deemed to have unwittingly "invited" the union representatives to the Birch Run job site by virtue of the fact that the collective

bargaining agreements maintained between Acoustical and the Carpenters Union contained union access clauses.

Wolgast timely filed its Petition for Review of the Order by the NLRB to the United States Court of Appeals for the Sixth Circuit (Pet. App. 22a). In its Petition, Wolgast argued that the NLRB had erred as a matter of law by ignoring this Court's controlling precedent as enunciated in Lechmere. Wolgast also argued that the Board erred by following the infirm reasoning of CDK, *supra*, because it resulted in the impermissible elevation of the union access clauses of the contracts (of which Wolgast had no knowledge and to which Wolgast was not a party) over Wolgast's paramount property right to control third party access to the job site.

In its Opinion dated September 16, 2003, the Court of Appeals rejected Wolgast's arguments and affirmed the Board's determination that Lechmere was inapplicable to the present case (Pet. App. 14a-15a). Since the Sixth Circuit impermissibly deviated from the standard enunciated in Lechmere, and since its deviation brings its decision in conflict with other federal circuits applying Lechmere, Wolgast has timely filed this Petition for Writ of Certiorari to the United States Supreme Court seeking review and reversal of the decision of the Sixth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

This case raises important questions regarding the scope and application of Lechmere, *supra*. In Lechmere, this Court reinforced the principle first established in NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), that there is a "distinction 'of substance'" between the exercise of Section 7 rights by employees and those asserted derivatively by

nonemployee union representatives. Hence, according to this Court in Lechmere at 537:

> ... § 7 speaks to the issue of nonemployee access to an employer's property. Babcock's teaching is straightforward: § 7 simply does not protect nonemployee union organizers except in rare case where "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels," 351 U.S. at 112. (Emphasis in original).

Clearly, Lechmere reaffirmed the rule that, absent employee inaccessibility, an employer cannot be compelled to allow nonemployee union officials access to the workplace.[2]

While the factual setting for Lechmere involved union access to the employer's property for organizing purposes, several circuit courts including the Sixth Circuit[3] have given the case broad application to all other forms of concerted activity under Section 7 of the Act. See, UFCW v. NLRB, 74 F.3d 292 (D.C. Cir. 1996); Metropolitan District Council of Philadelphia v. NLRB, 68 F.3d 71 (3rd Cir. 1995); Sparks Nugget, Inc. v. NLRB, 968 F.2d 991 (9th Cir. 1992). In the present matter, however, the NLRB and the Sixth Circuit have impermissibly veered from Lechmere and these other circuit courts of appeals by declaring Lechmere to be

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[2] Neither the Charging Party, the Board, nor the Sixth Circuit has ever contended or determined that Acoustical's employees were inaccessible to the Union in this case.

[3] See, for example, Cleveland Real Estate Partners v. N.L.R.B., 95 F.3d 457 (6th Cir. 1996) and Sandusky Mall Co. v. N.L.R.B. 242 F.3d 682 (6th Cir. 2001).

"inapplicable" where union officials seek access to an employer's private property for "representation" of union employees. The Sixth Circuit's affirmation of the NLRB thus results in a split of authority among the circuit courts on an issue of great public importance. Due to this divergent ruling, Lechmere's legacy - which was meant to create a bright-line union access rule - is in real danger of becoming a diverse, conflicting and uncertain body of case law leading to numerous unnecessary practical and legal problems for employers within the Sixth Circuit and around the country.

The Sixth Circuit's decision to deviate from this Court's bright-line rule regarding nonemployee access to private property lacks any legal foundation and unjustifiably subordinates employer property rights to the contractual obligations of third parties. The CDK Contracting case relied upon by the Board and the Sixth Circuit likewise contradicts the holdings of this Court and numerous other circuit courts of appeals. Accordingly, review by this Court is necessary to avert the negative consequences of the Board's and the Sixth Circuit's erroneous interpretation of the NLRA.

I. REVIEW IS WARRANTED BECAUSE THE RULING OF THE NLRB AND THE SIXTH CIRCUIT CREATING A DISTINCTION BETWEEN "ORGANIZATIONAL" AND "REPRESENTATIONAL" RIGHTS FOR PURPOSES OF UNION ACCESS TO AN EMPLOYER'S PRIVATE PROPERTY CREATES A SPLIT IN THE CIRCUIT COURTS OF APPEALS AND IMPRUDENTLY RESURRECTS THE LEGAL UNCERTAINTY THE SUPREME COURT SOUGHT TO ELIMINATE IN ITS LECHMERE DECISION.

Since the time this Court decided in Lechmere to reestablish the Babcock inaccessibility rule as applicable to all union access cases, several circuit courts of appeals have had

occasion to apply it. Contrary to the Sixth Circuit, the other courts of appeals have reaffirmed that union officials may exert statutory access rights to an employer's private property *only if* they can show that the target employees are inaccessible by other means.

In UFCW v. NLRB, *supra*, at 293, the D.C. Circuit, citing both Babcock and Lechmere, emphasized that "[f]or more than 35 years, the courts have consistently enforced Babcock's mandate, holding that, as a general rule, section 7 of the National Labor Relations Act ... does not give nonemployee union advocates the right of access to private property." (Emphasis in original). The D.C. Circuit then addressed the NLRB's contention that Babcock and Lechmere were distinguishable because they involved union attempts at organizing employees. Correctly assessing the union's "rights" as merely derivative of the target employees' Section 7 rights, the Court rejected the NLRB's contention that Babcock and/or Lechmere were inapplicable. The Court held at 293-4:

> We find no merit in petitioners' attempts to distinguish Babcock and Lechmere. *** Although Lechmere itself involved organizational activity, we find no support for the suggestion by petitioners that the [accessibility] exception should be easier to satisfy in the context of nonorganizational activity. Accordingly, the petitions for review are denied.

Within its Opinion, the D.C. Circuit explained at 297, 299:

> At heart, this case is a simple one. Babcock establishes (and Lechmere reaffirms) a general rule under which an employer may deny access to nonemployees seeking to trespass on the employer's

property. *** There should be no more to the matter than that. However, petitioners attempt to obfuscate this straightforward analysis by proffering artificial distinctions between the section 7 rights asserted in Babcock and Lechmere, and those being asserted here.

*** We decline to read Lechmere so narrowly. As the Board has observed, there is "no suggestion in the Court's opinion ... that it focused on organizing activities for any reason other than that Lechmere was an organizing case, and that the Court was simply (and prudently) deciding the case before it." [Citations omitted].

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In effect, the Court in Babcock made a once-and-for-all determination that, in the absence of an inaccessibility showing, the locus of accommodation for cases involving trespass by nonemployee union adherents will always fall in the range favoring denial of access, and Lechmere reaffirmed that determination. [Footnote omitted.] And although Babcock and Lechmere were organizational cases, the reasoning therein is equally applicable in any situation where the exercise of a section 7 right requires communication of a message to a target group. (Emphasis added).[4]

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[4] The D.C. Circuit recently reaffirmed its UFCW holding in the case of New York New York, LLC v. NLRB, 313 F.3d 585 (D.C. Cir. 2002). There, the D.C. Circuit refused to enforce a Board order requiring an employer to provide access to its property to off-duty employees of a tenant who were seeking to organize the tenant's employees. The Court concluded that the Board had not

The Third Circuit Court of Appeals has also given this Court's bright-line union access rule broad application without regard to the "type" of right asserted under Section 7 of the Act. In Metropolitan District Council of Philadelphia v. NLRB, 68 F.3d 71 (3rd Cir. 1995), the Court rejected the NLRB's contention that access to the employer's private property was justified without a showing of inaccessibility because the type of concerted activity (handbilling) was in furtherance of the "direct" Section 7 rights of employees on the employer's premises. Like the D.C. Circuit, the Third Circuit refused to recognize such arbitrary Section 7 distinctions. The Third Circuit found no reason why the rule reached in Lechmere favoring employer property rights "would be any less compelling in a case in which a union was engaged in area standards handbilling than in a case where the union was engaged in direct organizational activity." Id. at 74.

Specifically, the Court held:

> Petitioner seeks to avoid this result by playing on the distinction between direct and derivative rights in section 7 ... We decline to read Lechmere so narrowly. The question is not whether the right is described more aptly as direct or derivative, but whether the private property rights of an employer must give way to the rights of nonemployee interlopers. We believe that primary thrust of Lechmere was to reemphasize the protection of employers' private property rights against

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taken Lechmere and other pertinent precedent into account in reaching its decision and remanded the case for proper analysis. Id. at 587-91.

> unwarranted intrusions by nonemployees. The "distinction of 'substance'" is between the employees of the employer who is asserting his property rights and the individuals who do not work for that employer but seek access to his property ... . *The case finally gets down to this easily understandable rule of law: a nonemployee does not have a right of access to the employer's property, at least if he has reasonable alternative means to exercise his section 7 rights whether they are direct or derivative.* (Emphasis added). Id.

The Ninth Circuit has also demonstrated its strict adherence to the Babcock union access rule (as reaffirmed in Lechmere) when addressing the NLRB's argument that union officials should have access to an employer's property in order to further the Section 7 rights of employees in non-organizing settings. In Sparks Nugget, Inc., v. NLRB, 968 F.2d 991 (9th Cir. 1992), the Ninth Circuit evaluated the standards concerning union access to the employer's property for picketing and distributing handbills based on the employer's failure to bargain in good faith with the union as the representative of the employer's employees. Even though the union was engaged in representational activity on behalf of the employer's employees (picketing and handbilling in response to the employer's unfair labor practice), the Ninth Circuit rejected the union's argument that Lechmere did not apply. Id. at 998. Thus, the Court held that, despite the employer having committed an unfair labor practice for failure to bargain with the union, the union could not trespass onto the employer's property absent a showing that employees were inaccessible. Id.

In contrast to the these decisions from other courts of appeals, the Sixth Circuit in the present case fixated on the

underlying facts of Lechmere and erroneously concluded that the case could be distinguished based on the type of Section 7 right the union officials sought to exercise. In an apparent attempt to make the distinction workable, the Circuit Court conjured an unnecessary legal fiction that, when a union seeks access to an employer's property for "representational purposes," the right of access is no longer derivative but, rather, is exercised as a "direct representative of the subcontractor's employees under the authority of the collective bargaining agreement." (Opinion, p. 9-10; Pet. App. 12a-13a). Not surprisingly, the Sixth Circuit provided no legal support whatsoever for its stark divergence from Lechmere or for its conclusion that union access rights supercede an employer's property rights where union officials seek property access under the guise of contract enforcement.

The Board and the Sixth Circuit have essentially created an exception to this Court's Babcock and Lechmere union access rule. They have diverted the focus away from whether union officials have alternative access to the targeted employees (the accessibility test), toward whether the union officials have sought access to further the collective bargaining interests of employees working on the employer's premises. Opinion at 10 (Pet. App. 13a). Under the analysis of the NLRB and the Sixth Circuit, it would appear that union officials would *always* have the right to access the employer's property as long as the employees on the property are covered by a collective bargaining agreement. Such an analysis is clearly contrary to Lechmere and represents an unwarranted departure from established case precedent.

Lechmere constitutes a bright line rule applicable to *all* nonemployee union access cases. The rule recognizes an employer's paramount property rights to exclude nonemployee union officials from its property. Embodied

within that rule is only *one* exception - applicable only where union officials can demonstrate that the targeted employees are not accessible by other available means. The Sixth Circuit has ignored this rule and developed its own exception to Lechmere. The exception was never contemplated by this Court and it stands in direct conflict with the rulings of all other circuit courts of appeals which have applied Lechmere.

Not only has the Sixth Circuit strayed from the precedent of this Court and that of all other circuit courts of appeals, but the lower Court has embraced the kinds of line drawing problems which the NLRB admitted was part and parcel of its pre-Lechmere balancing test.[5] By its ruling in this case, the Sixth Circuit has resurrected the confusion and murkiness that attended union access cases prior to Lechmere which this Supreme Court specifically sought to put to rest in Lechmere through reaffirmation of Babcock's union access rule.

Under the Sixth Circuit's ruling, an employer must now delve into a legal morass if the requestor for property access

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[5] Prior to Lechmere, the NLRB developed "a three-factor balancing test [applicable to] all [union] access cases" taking into account the various interests of employees, union officials and employers. Lechmere at 535-6, citing Jean Country, 291 N.L.R.B. 11 (1988). After referencing that the Board had conceded its balancing test "was unlikely to foster certainty and predictability in this corner of the law," the Lechmere Court determined that the NLRB's balancing test impermissibly eroded the Court's 1956 inaccessibility rule from Babcock, "at least as to nonemployees." Id at 536, 538. Thus, this Court reaffirmed Babcock's general rule for *all* access cases, specifically ruling that an employer can validly bar nonemployee union officials from its property unless the union can meet a "heavy" burden of showing that the targeted employees are otherwise inaccessible. Id. at 538-540.

is a union official purporting to represent another employer's employees. Where a union requests access within the jurisdiction of the Sixth Circuit, the employer is required to first determine the purpose for the request, and then to properly label the request as one in furtherance of "organizing" or "representing" employees. If the request is for "representation" purposes, then the employer must apparently determine whether the union maintains a collective bargaining agreement with another employer lawfully on the premises and, if so, whether that contract contains a legally enforceable union access clause which might apply to the employer's premises. Opinion at 10. (Pet. App. 13a). If such a clause exists and applies, an exception to Lechmere is created according to the Sixth Circuit, and the employer must grant access to the union officials regardless of whether alternative access is available. Opinion at 10. (Pet. App. 13a).

These legal hoops pose their own particular problems. For instance, in the present case, Wolgast voluntarily allowed access to the Carpenters Union officials on October 13, 1999, to handle what Wolgast believed was a minor matter. However, when the union officials returned the next day to resume "union business" in a work area, Wolgast objected. (Pet. App. 61a). According to the Sixth Circuit, it became incumbent upon the Wolgast manager on site to immediately determine whether the union officials were there to make inroads at organizing other employees (in which case Wolgast could exclude the officials), or whether they were there to represent union members of another employer in some way (in which case access could not be denied). Resolution of these kinds of fact intensive, state-of-mind inquiries required under the Sixth Circuit's rule in union access cases are not only burdensome, *but nearly impossible* for managers to immediately make on a case-by-case basis.

The problem is further complicated when a union official seeks access for a dual purpose - to "represent" existing union members of another employer *and* to organize other unrepresented employees (a circumstance Wolgast believes existed in the present case). Can access be denied or must it be granted in such a case? If access must be granted for representation purposes, how can the employer monitor the union officials' visit to properly prevent organizing or other activities that interfere with work without running afoul of the Section 7 rights of employees? These kinds of factual and legal dilemmas are not unique to this particular case. They would arise in virtually any case that comes before the Board and the Sixth Circuit where a union seeks access to employees.

The harm to employers caused by the rulings of the Board and the Sixth Circuit are not confined to the Sixth Circuit's jurisdiction. To clearly demonstrate the disparity between the circuits and the havoc that the Sixth Circuit's ruling can cause for an employer faced with union access claims, one need only place himself in the shoes of an employer who operates in more than one jurisdiction. As the case law currently stands, that employer must be aware of the conflicting analyses employed by the various circuits in order to properly respond to a union's request for access. To require that employer to recognize and readily apply different union access rules based on the location of the job sites is to invite legal chaos into the body of federal labor law which Congress sought to synergize through passage of the NLRA in 1935.

The split within the circuits created by the Sixth Circuit's misunderstanding and misapplication of Lechmere thus raises an issue of great public importance. The decisions of the Board and the Sixth Circuit confound the property rights of owners from circuit to circuit and create uncertainty and

confusion among employers when faced with union access claims. Therefore, review is warranted both to resolve the split of authority within the circuits and to forestall the needless, burdensome effects caused by the Board and the Sixth Circuit on all multi-employer job sites across the nation.

II. REVIEW IS WARRANTED BECAUSE THE DECISION OF THE NLRB AND THE SIXTH CIRCUIT IMPOSES THE TERMS OF A SUBCONTRACTOR'S UNION CONTRACT ON A NON-PARTY EMPLOYER IN DIRECT CONFLICT WITH SUPREME COURT PRECEDENT AND HOLDINGS OF CIRCUIT COURTS OF APPEALS.

The Sixth Circuit decision in this case presents an additional conflict with precedent from this Court and other circuit courts of appeals, thus justifying Supreme Court review. Specifically, this Court should review whether the NLRB and Sixth Circuit Court committed an error of law when they determined, in reliance on the NLRB's 1992 CDK Contracting case, *supra*, that union officials possess a superior right of access to an employer's private property based on a visitation clause found in a subcontractor's collective bargaining agreement. It is black-letter federal labor law precedent that a contractual agreement between two parties simply cannot logically or lawfully serve to trump a non-party's private property rights.

This Court has stated, "[i]t goes without saying that a contract cannot bind a non-party." EEOC v. Waffle House, Inc., 534 U.S. 279 (2002). This rule applies with equal force under the NLRA. Indeed, the Supreme Court, unlike the NLRB and the Sixth Circuit in the present case, has refused to extend the terms of a collective bargaining agreement to non-signatory third parties. For example, in NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972),

this Court was called upon to review a Board determination that required a successor employer to take over and honor the terms of a predecessor's collective bargaining agreement. The Supreme Court unanimously rejected the Board's departure from basic contract law, finding that the successor could not be bound by the predecessor's labor agreement. Id. at 284-5.

Other federal circuit courts of appeals have had no difficulty strictly adhering to the basic privities of contract principles referenced by this Court in Waffle House and Burns, *supra*. See, *e.g.*, Leber v. Universal Music and Video Distribution, Inc., 332 F.3d 452, 454 (7th Cir. 2003); ("MUMS cannot be held liable on a contract to which only Universal is a party, any more than Universal may be held liable on a contract to which only MUMS and the Union are parties."); AmeriSteel Corp. v. Teamsters, Local 430, 267 F.3d 264, 265 (3rd Cir. 2001) ("[A]n unloosening successor cannot be bound by the substantive provisions of its predecessor's agreement ... ."); New Breed Leasing Corp. v. NLRB, 111 F.3d 1460, 1466 (9th Cir. 1997) (a successor is not bound by the substantive terms of another's agreement); Olsen v. Shell Oil, 708 F.2d 976, 985 (5th Cir. 1983) (a waiver in a contract will not bind a non-party).[6]

In the present case, the Sixth Circuit concluded that the Board properly granted access to Union officials due to the existence of visitation clauses found in the collective

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[6] Even the Sixth Circuit has recognized this fundamental point as it specifically held in EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d. 448, 460 (6th Cir. 1999) that, "[u]nder general principles of contract law, it is axiomatic that courts cannot bind a non-party to a contract, because that party never agreed to the terms set forth therein."

bargaining agreements between a subcontractor working on the job site, Acoustical, and the Carpenters Union. Opinion at 11 (Pet. App. 13a-14a). After erroneously concluding that Lechmere was inapplicable (because the Carpenters were not engaged in organizing activity), the Sixth Circuit adhered to the NLRB's legal fiction that a general contractor such as Wolgast is deemed to have "invited" the union officials onto the property simply by subcontracting with a union subcontractor, and that a general contractor in such instances is thereafter "not privileged to interfere" with job site access by the union officials. Opinion at 9 (Pet. App. 11a). Reaching this decision, the NLRB and the Court relied primarily on the Board's decision in CDK Contracting, 308 N.L.R.B. 1117 (1992) - a case decided within a few months after this Supreme Court's Lechmere decision. With regard to the applicability of the then-recently decided Lechmere case, the CDK Board ruled:

> At issue here is whether a general contractor may deny access to a job site to union officials who seek to communicate with employees of a subcontractor represented by the union where a visitation clause in the contract between the subcontractor and the union permits access. As the Judge reasoned, the Respondent, by soliciting other employers to perform work at the jobsite, "invited" subcontractors, and their respective subcontractors, onto the jobsite, and thus subjected its "property rights" to the Union's contractual "access" rights with those contractors. [Footnote omitted.] Thus, the Respondent here, unlike the Respondent in Lechmere, voluntarily undertook to have work performed by unionized subcontractors on the property. In these circumstances, the Respondent was not privileged to interfere with the contractual obligations of the

> subcontractors and the contractual rights of the unions that represented subcontractor employees. We conclude that the Respondent must permit those contractors to observe their contractual obligations.

CDK, 308 NLRB at 2-3. Thus, without any legal support whatsoever, the Board in CDK dismissed the Supreme Court's directives in Lechmere and set forth its own legal theory that third party contract rights circumvent employer property rights when union subcontractors are working on the employer's property.[7]

The basis of CDK and the decisions of both the NLRB and Sixth Circuit in this present case all suffer from the same legal defect - private property rights of an employer cannot logically fall subject to a contractual union access clause of a subcontractor and a union because there is absolutely no privity of contract with the employer. Application by the Board and the Sixth Circuit of the terms of a private contract to the detriment of an outside third party violates the most basic tenets of contract law. Moreover, by extending contractual obligations to Wolgast as a third party not in privity with the contracting parties, the Board and the Sixth Circuit have ignored controlling Supreme Court precedent which prohibits such extensions and have created a conflict in precedent among the circuit courts of appeals.

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[7] The CDK case relied heavily upon Villa Avila, 253 N.L.R.B. 76 (1980) *enf'd as modified*, 673 F.3d 381 281 (9th Cir. 1982), a case decided over a decade before Lechmere. However, there is no indication that either Villa Avila or the cases that it relied upon remain good law after the Lechmere decision. Thus, the NLRB's and Sixth Circuit's direct and indirect reliance upon Villa Avila is misguided at best and constitutes an unsupported and impermissible departure from Lechmere.

As shown above, in numerous previous cases decided by this Court and the various circuit courts of appeals, the courts recognized and applied the fundamental (and obvious) principle of law that contractual rights and obligations apply between parties to a collective bargaining agreement - not to those who are not a party to the contract. The Board and the Sixth Circuit have failed to adhere to this core principle. Instead, the Board and the Sixth Circuit have burdened all third party employers with substantive terms of union contracts that thwart their own property rights.[8] The CDK decision was wrong when it was decided, and the Sixth Circuit's decision to follow CDK's faulty logic is wrong now. Wolgast had legitimate rights to control access to the Birch Run property and, pursuant to Lechmere and Burns, those rights simply should not be held hostage to terms of a contract to which Wolgast has never been a party.[9] Perhaps more importantly, the decision of the Sixth Circuit to follow the faulty precedent of the Board in CDK results in a split of

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[8] While the present case involves forcing a union access clause on Wolgast as a third party general contractor, there is nothing in the reasoning of the Sixth Circuit's Opinion to prevent eventual application of *any other collectively bargained terms* to any third party employer.

[9] Further difficulty exists with the lower court's decision because neither CDK, nor the Sixth Circuit's Opinion provide answers to situations (as here) where a general contractor, Wolgast, *was not even aware* of a collective bargaining agreement between its subcontractor and any particular union, much less aware of the union visitation clause contained within it. In this regard, Wolgast was completely unaware of any of the terms of the collective bargaining agreement between Acoustical and the Union, Hearing Tr. (Pet. App. 73a-77a), a fact never contradicted by any of the holdings of the ALJ, the Board or the Sixth Circuit in this case.

authority in the circuit courts which this Supreme Court should review and correct.

Simply put, both the Sixth Circuit's Opinion and the underlying CDK decision constitute bad law.[10] The legal fiction that a general contractor "invites" the application of a contract of which it is not aware and to which it is not even a party so as to eliminate its private property rights is absurd and does violence to fundamental privity of contract rules recognized by this Supreme Court and every other circuit court of appeals. Thus, the unsupported circumvention by the

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[10] Perhaps the best example of the unsupported and illogical approach of the Board and the lower court to circumventing an employer's property rights can be found in a previous contradictory holding of the NLRB. In Local No. 447, United Assoc. of Journeyman & Apprentices of the Plumbing & Pipefitting Industry, 172 N.L.R.B. 128 (1968), the Board held that an employer does not discriminate against employees within the meaning of Section 8(a)(3) of the Act by ceasing to do business with another employer because of the union or non-union activity of the latter's employees. Id. at *7. Thus, applying the holding of Local No. 447 to the present case, Wolgast would have been justified in terminating its subcontract with Acoustical based on Acoustical's union status. Since Wolgast, could, with impunity, terminate its subcontract with Acoustical to avoid union entanglements, how could it be that Wolgast fell subject to its union subcontractor's contractual obligations when Wolgast was not even aware of the underlying collective bargaining agreements, much less a party to them? Reason and logic dictate that if an employer retains the right to lawfully terminate contractual relations with another employer based on the other's union affiliation, then inherent within that right must exist the equal right to disregard, with impunity, the union employer's collective bargaining obligations with a third party union. This is particularly true in light of the very strong employer property rights favored by the U.S. Supreme Court in Lechmere.

Sixth Circuit of well-established notions of employer property rights recognized in Lechmere should be overruled through review of the present case by this Supreme Court.

CONCLUSION

It is virtually black letter law that "one of the most essential sticks in the bundle of rights that are commonly characterized as property [is] the right to exclude others." Kaiser Aetna et. al. v. United States, 444 U.S. 164 (1979). The Sixth Circuit's decision in the present case, which erroneously disregards this Supreme Court's binding precedent enunciated in Lechmere, effectively strips employers of that right. Moreover, the Sixth Circuit's ruling creates an undesirable disparity between the circuits with regard to union access rights to an employer's property. Consequently, these conflicting decisions within the circuits result in confusion and uncertainty for employers and unions alike, which simply cannot be justified. In short, this case has important legal practical applications to the business community which warrant Supreme Court resolution.

Supreme Court review is necessary to provide employers and unions representing workers with a clear understanding of union access rules applicable to job sites. For the foregoing reasons, Petitioner, Wolgast Corporation, respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Dated: December 12, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 01-1904 and 01-2056

[Filed September 16, 2003]

WOLGAST CORPORATION, Petitioner/Cross-Respondent,	)
v.	)
NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner.	)

BEFORE: MERRITT and DAUGHTREY, Circuit Judges; RUSSELL, District Judge

JUDGMENT

THIS MATTER came before the court upon a petition for review and cross-application of an order against Wolgast Corporation.

UPON FULL REVIEW of the record and the briefs and arguments of counsel, we conclude that the decision of the National Labor Relations Board should be enforced, and accordingly:

IT IS SO ORDERED that the petition to review the order issued by the National Labor Relations Board in this matter be DENIED and the cross-petition for enforcement be GRANTED.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 01-1904 and 01-2056

[Filed September 16, 2003*]

WOLGAST CORPORATION,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW
and Cross-Application for Enforcement of an Order
of the National Labor Relations Board
No. 7-CA-42474

* This decision was originally issued as an "unpublished decision" filed on September 16, 2003. On October 28, 2003, the court designated the opinion as one recommended for full-text publication.

JUDGES: BEFORE: MERRITT and DAUGHTREY, Circuit Judges, RUSSELL,* District Judge

OPINION

MERRITT, Circuit Judge. The central issue in this case is whether nonemployee union representatives of the organized employees of a construction subcontractor, whose collective bargaining agreement contains a union access clause, can be categorically barred from a construction jobsite by the contractor with the asserted property interest. Wolgast Corporation petitions this Court for review of the order of the National Labor Relations Board finding that Wolgast committed an unfair labor practice by barring union representatives from accessing a construction jobsite, and the Board has cross-petitioned for enforcement of its order. We conclude that Wolgast's petition is without merit and therefore issue an order of enforcement.

I. Background

Wolgast, a non-union general contractor that hires both union and non-union subcontractors to do construction work, was hired by Cinema Hollywood, LLC to construct an addition to a movie complex. Wolgast subcontracted with Acoustical Arts. Inc., a union contractor, for the required acoustical installation. Acoustical's carpenter employees were represented by Local 706, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Article V, section c of the Carpenters Local 706 collective bargaining agreement states, in relevant part:

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* The Honorable Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

> Business representatives shall have access to all jobs at all times where possible. A representative of the Michigan Regional Council of Carpenters shall have the right to visit the job during working hours to interview the employer, steward, or men at work, but shall not hinder the progress of the work.

(J.A. at 85.) On October 13, 1999, Leon Turnwald, the business representative and organizer for Local 706 went with Robert Horner, the business representative from Local 1045, the union representing the lathers employed by Acoustical, to the Cinema Hollywood job site "to check on" a new Acoustical employee. According to Turnwald, Brian Grandy, a supervisory employee of Wolgast and the project's superintendent, ordered Turnwald off the property. Before leaving the property, Turnwald discovered that the new employee had already left the site before the end of his shift. That evening, Turnwald spoke to the employee by telephone, who said he could not work at the site because the scaffolding was dangerous. Turnwald then spoke to John Binder, the owner of Acoustical, who said the scaffolding was safe. Turnwald also learned that they had forgotten to sign up a new lather while at the site. The next day, Turnwald and Horner went to the site to check on the scaffolding and sign up the employee. Once again, Grandy ordered them to leave the property, this time "ranting and raving" and asking "what the fuck are you guys doing here again?" Grandy grabbed Turnwald's arm and pulled him down a hallway until Horner stepped between them. Grandy continued down the hallway, and Turnwald proceeded to sign up the new employee at a makeshift table made of a sheet of plywood resting on bats of insulation. During this process. Binder came in and placed his set of tools on the makeshift table. At some point. Horner and Binder stepped outside for a moment. When Turnwald had a question about the paperwork, he also stepped outside to ask

Horner how to fill it out. As they both began to reenter the building, Grandy stood in the doorway blocking their access, stating "You guys get the fuck out of here, you're not coming back in." Turnwald brushed past Grandy and went back in to finish the paperwork. Grandy then said to the new employee, who was on his knees by the makeshift table filling out the paperwork, "That's all the fucking union does is take your money," to which the employee replied, "No, the union's the only way I can get ahead." Announcing that he was going to "clean up this area right here," Grandy reached down, grabbed the makeshift table and forcefully flipped it over so everything on it, including Binder's tools, flew off and onto Turnwald. At this, Turnwald and Horner left the site, apparently abandoning their plan to check the safety of the scaffolding.

The administrative law judge ruled that Wolgast violated section 8(a)(1) of the Act by interfering with Turnwald's access to the jobsite. Relying on *CDK Contracting*, 308 N.L.R.B. 1117 (1992), the judge ruled that the general construction contractor with the asserted property interest is obligated as a matter of labor law to yield its interest so that the subcontractor's employees' section 7 right to be represented by their chosen union and to receive the agreed-upon benefits of that representation may be fully implemented. The judge ordered Wolgast to allow Local 706 access to Acoustical employees when requested, subject to any "reasonable and nondiscriminatory rules pertaining to nonemployee access" Wolgast may put in place. On appeal to the Board. Wolgast argued that *CDK Contracting* was wrongly decided and that this case is instead controlled by *Lechmere v. N.L.R.B.*, 502 U.S. 527, 117 L. Ed. 2d 79, 112 S. Ct. 841 (1992). There, the Supreme Court held that an employer may categorically exclude nonemployee union organizers from its property subject to two narrow exceptions

not applicable here. Finding that this case, like *CDK Contracting,* presents "substantially different issues and considerations" from those presented in *Lechmere,* the Board rejected Wolgast's argument and affirmed.

II. Analysis

Section 8(a)(1) of the National Labor Relations Act provides that "it shall be an unfair labor practice for an employer [] to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7 of this Act]." 29 U.S.C. § 158(a)(1). Section 7 provides in pertinent part that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.." 29 U.S.C. § 157. An employer therefore violates section 8 and commits an unfair labor practice where it restrains or interferes with employees' section 7 rights. *Lechmere*, 502 U.S. at 531-32.

We review *de novo* the Board's interpretation of Supreme Court and Sixth Circuit decisions, and uphold the Board's "reasonably defensible" construction of the Act in the absence of binding precedent. *See Meijer v. NLRB*, 130 F.3d 1209, 1212 (6th Cir. 1997). In determining whether the Board's construction of the Act is "reasonably defensible." we keep in mind that the "task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights and to seek a proper accommodation between the two." *Hudgens v. NLRB*, 424 U.S. 507, 521, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976) (internal quotations omitted). As always, accommodation between employees § 7 rights and employers's property rights "must be obtained with as little

destruction of the one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 76 S. Ct. 679, 100 L. Ed. 975 (1956). We turn first to the Board's determination that *Lechmere* does not determine the outcome of this case as a matter of law.

In *Lechmere,* union organizers distributed handbills on the windshields of cars parked in a shopping plaza parking lot as part of an effort to organize the employees of Lechmere, Inc.'s retail store located at the shopping plaza. Lechmere personnel removed the handbills and asked the union organizers to leave. The administrative law judge ruled that Lechmere had violated section 8 by barring the nonemployee union organizers from its property. The Board affirmed, relying on a multifactor balancing test developed in *Jean Country*, 291 NLRB 11, 14 (1988). The Supreme Court denied enforcement of the Board's order, holding that, at least as applied to nonemployee union organizers, *Jean Country* impermissibly eliminated the threshold stage of the inquiry by failing to make a distinction between employees and nonemployees of the targeted employer. *See Lechmere*, 502 U.S. at 538 (citing *Babcock & Wilcox*, 351 U.S. at 112). The Court reiterated the "distinction of substance" established in *Babcock & Wilcox* between the organizing activities of employees and nonemployees: "As a rule, then, an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property." *Id.* at 533. As explained by the Court:

> To say that our cases require accommodation between employees' and employers' rights is a true but incomplete statement, for the cases also go far in establishing the *locus* of that accommodation where nonemployee organizing is at issue. So long as nonemployee union organizers have reasonable access

> to employees outside an employer's property, the requisite accommodation has taken place. It is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation to the next level, balancing the employees' and employers' rights ...

Id. at 538 (emphasis in original).

Lechmere thus reaffirms that, in the generic situation presenting a conflict between the competing interests of employees and employers, the primary responsibility to make the proper accommodation lies with the Board, whose determination is subject to review only for reasonableness. In the specific case of nonemployee union organizers who attempt to enter an employer's property for purposes of organizing, however, the Board does not even reach the balancing stage of the inquiry: An employer may "post his property against nonemployee distribution of union literature if [1] reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and [2] if the employer's notice or order does not discriminate against the union by allowing other distribution." *Babcock & Wilcox*, 351 U.S. at 112.

The Board's pre-Lechmere decisions requiring the contractor to allow union access to its unionized subcontractor's jobsite are founded on its view that the represented employees' § 7 rights "include the right to receive the various services of union business agents which services are necessary to police existing collective-bargaining agreements or to negotiate new agreements." *See, e.g., Villa Avila*, 253 NLRB 76, 80 (1980), *enf'd. as modified,* 673 F.2d 281 (9th Cir. 1982); *see also C.E. Wylie Constr. Co.*, 295 NLRB 1050, 1050 (1989). The administrative judge in *Villa*

Avila further explained that, by hiring unionized subcontractors to perform work on the jobsite, the general contractors

> have thereby invited these subcontractors to, in effect, maintain a temporary place of business on the site, at which locus the working conditions of the subcontractors' employees are necessarily established. It may therefore be reasonably inferred that Respondents, by hiring such subcontractors, thereby "necessarily submitted their own property rights to whatever activity, lawful and protected by the Act," might be engaged in by union business agents in the performance of their duties vis-a-vis these subcontractors who have contractually granted union business agents unrestricted access to the site.

Villa Avila, 253 NLRB 76, 81 (1980) (quoting *Hudgens v. NLRB*, 230 NLRB 414, 418 (1977) (on remand)). The Board acknowledged that the union representatives were not employees of the contractor or subcontractor, but reasoned that under the factually distinct circumstances involving the subcontractor's employees' own § 7 right to union access under a collective bargaining agreement and the union's manifest representative capacity regarding that same right, balancing was appropriate and the represented employees' right outweighed the contractor's right to control the property. *See id.* at 80-81. According to the Board, the common and accepted procedures in place at construction sites requiring that the union representatives give notice of their presence to the general contractor "effectively accommodate the interests and obligations of all parties." *Id.* at 81.

Just a few months after *Lechmere* was decided, the Board relied on *C.E. Wylie Construction Co.* and *Villa Avila* to reaffirm that a construction contractor must permit its unionized subcontractor to allow union access pursuant to the collective bargaining agreement between the subcontractor and the union. *See CDK Contracting*, 308 NLRB at 1117. The Board again distinguished the Supreme Court's general rule regarding nonemployee organizers as reaffirmed in *Lechmere,* stating that *CDK Contracting* presented "substantially different issues and considerations." *Id.* Under these particular circumstances, "access is necessary in order to investigate and to resolve contract compliance when the contract grants the union such access." *Id.* (citing *Villa Avila*, 253 NLRB at 81). Unlike the situation in *Lechmere,* the contractor, "by soliciting other employers to perform work a the jobsite. 'invited' subcontractors, and their respective subcontractors, onto the jobsite, and thus voluntarily subjected its 'property rights' to the Union's contractual 'access' rights with those contractors." *Id.* As a result, "the Respondent [contractor] was not privileged to interfere with the contractual obligations of the subcontractors and the contractual rights of the unions that represented subcontractor employees." *Id.* Finally, without access pursuant to the access provision, the "Union did not have a reasonable, effective alternative means to enforce its contractual rights." *Id.*

Respondent Wolgast asserts here that the Board's rule in *CDK Contracting* stands as a "radical departure" from *Lechmere.* In support, Wolgast points to the Court's statement in *Lechmere* that, "by its plain terms, ... the NLRA confers rights only on *employees,* not on unions or their nonemployee organizers." 502 U.S. at 532 (emphasis in original). According to Wolgast, this statement provides a "trump card" by predetermining that every nonemployee union representative can be barred from its property, regardless of

his purpose or relationship with employees located on the jobsite, in the same manner as the nonemployee union organizer in *Lechmere*. Wolgast further points out that this court has construed *Lechmere* to extend beyond the purely organizational situation to apply to situations involving other nonemployee union activities. *See, e.g., Albertson's Inc. v. NLRB*, 301 F.3d 441, 454 (6th Cir. 2002) (holding that, under *Lechmere,* an employer may bar nonemployee union representatives from distributing handbills on the employer's property informing the employer's patrons of the union's economic strike with one of the employer's suppliers); *Sandusky Mall v. NLRB*, 242 F.3d 682, 686 (6th Cir. 2001) (applying *Lechmere* in a case involving "area standards" handbilling by nonemployee union representatives urging shoppers not to patronize a store hiring a non-union contractor); *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996), *overruled on other grounds in NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1119 (6th Cir. 1997) (applying *Lechmere* to handbilling by nonemployee union representatives urging a boycott of a nonunion store at a strip mall).[1]

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[1] Wolgast also relies on *NLRB v. Windemuller Electric, Inc.*, 34 F.3d 384 (6th Cir. 1994), in which a panel of this court relied on *Lechmere* to hold that an employer can lawfully prevent its unionized employees from placing union stickers on their employer-owned hardhats. A later panel of this court rejected Windemuller's reasoning, however, insofar as it treated the employees' right to wear union insignia as a matter of property rights under *Lechmere* rather than of employees' organizational rights under *Republic Aviation*. *See Meijer Inc. v. NLRB*, 130 F.3d 1209, 1217 (6th Cir. 1997) (holding that under the balancing test in *Republic Aviation*, 324 U.S. 793, 89 L. Ed. 1372, 65 S. Ct. 982 (1945), "employees have a right to wear union insignia" on employer-owned uniforms).

In our view, *Lechmere* and the cases cited from our court are readily distinguishable from this case. Most significantly, the union agent at issue here did not seek access for purposes of organizing employees, handbilling patrons, boycotting, or other similar activity in exercise of the union's "derivative" § 7 rights. Rather, Turnwald sought access as the direct representative of the subcontractor's employees under the authority of the collective bargaining agreement. In our view, at issue here is the employees' own undisputed § 7 right to negotiate and benefit from a collective bargaining agreement which allows union access for purposes of investigating the premises and interviewing employees on-site. Neither *Lechmere* nor any of our cases address union access for representational purposes.

In any event, we have stated elsewhere that *Lechmere's* statement that the Act "confers rights only on employees" is not so expansive as Wolgast suggests. In *BE&K Construction Co. v. NLRB*, 246 F.3d 619, 626-27 (2001), *rev'd on other grounds*, 536 U.S. 516, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002), we were faced with the question whether a union whose members work for construction subcontractors possess a § 7 right that could potentially be violated by the nonunion contractor-employer when the employer filed baseless lawsuits in retaliation for the union's activities. In concluding that unions possess such a § 7 right, we distinguished *Lechmere* as specifically involving nonemployee union organizers attempting to distribute organizational literature on an employer's property. *Id.* at 627. We further noted that, by allowing exceptions to its rule, "the Court ... recognized that § 7 of the Act, by necessary implication, extended some legislative protection to unions." *Id.* at 626.

As a general matter, it is a reality inherent in construction work that a construction subcontractor's employees work on

the property of another. The Board has set forth reasons that adequately take into account the specific circumstances presented here, carefully considering the asserted property rights of the contractor and the accommodations required when the contractor voluntarily hires unionized subcontractors. Contrary to Wolgast's suggestion, the Board did not hold that a general contractor is "bound" to a contract term to which it is not a party. Rather, it held that the contractor may not interfere with the protected activity relating to a union subcontractor and its employees in the name of private property interests. *See Hudgens*, 424 U.S. at 510 nn.3 & 11 (recognizing that "a statutory 'employer' may violate § 8(a)(1) with respect to employees other than his own"). We agree with the Board's reasoning in *Villa Avila* that, to the extent that general contractor interferes with the duties of the union as representative of the subcontractor's employees, "so are the employees' Section 7 rights diminished." 253 NLRB at 81. Under the circumstances presented here, the Board's balancing of the conflicting interests in *CDK Contracting* is a reasonably defensible interpretation of the Act.

Finally, regarding Wolgast's assertion that Turnwald waived his access right because he did not follow Wolgast's rules for visiting the jobsite, we affirm the Board's ruling. The administrative law judge found no credible evidence that there were such rules or that they were conveyed to the union agent. This finding was undisturbed by the Board, and we cannot say it is clearly erroneous. We need not address Wolgast's other arguments, as they are wholly without merit.

III. Conclusion

In *CDK Contracting,* the Board correctly concluded that *Lechmere* did not control the outcome of the case. In

exercising its authority to strike the proper balance between the property interests of a construction contractor and the interests of the employees of its unionized subcontractors to benefit from their collective bargaining agreement, the Board has created a rule that is both "reasonably defensible" and in accord with the guiding principle of labor law. Accordingly, we DENY Wolgast's petition for review and GRANT the Board's request for enforcement of its order.

APPENDIX C

NATIONAL LABOR RELATIONS BOARD

LEXSEE 334 N.L.R.B. 203

Case 7-CA-42474

[Filed June 5, 2001]

Wolgast Corporation *and* Local 706, United Brotherhood of Carpenters & Joiners of America, AFL-CIO

DECISION AND ORDER

By Members Liebman, Truesdale, Walsh

On October 25, 2000, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief. In addition, the Associated Builders and Contractors, Inc. filed a brief as amicus curiae in support of the exceptions filed by the Respondent.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the

judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.

In October 1999,[2] the Respondent, a nonunion general contractor, was engaged to construct a theater complex in Birch Run, Michigan. Respondent hired ten subcontractors to work on this job, including Acoustical Arts, Inc. Local 706, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, represented Acoustical Arts' carpenter employees. On October 14, Local 706 organizer Leon Turnwald visited the jobsite to investigate a safety complaint of member Ray Cotton. According to Turnwald's credited testimony, the Respondent's project superintendent, Brian Grandy, ordered Turnwald off the jobsite and engaged in other physical conduct designed to interfere with Turnwald's access to Acoustical Arts' employees on the jobsite.

The contract between Acoustical Arts and Carpenters Local 706 contains a union access clause stating that

> business representatives shall have access to all jobs at all times where possible. A Representative of the Michigan Regional Council of Carpenters shall have the right to visit the job during working hours to

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates hereafter refer to 1999, unless otherwise indicated.

interview the Employer, Steward, or men at work but shall not hinder the progress of work.

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by interfering with a Local 706 official's access to the jobsite pursuant to the access provision in the Union's collective-bargaining agreement with Acoustical Arts.[3] We agree with the judge that the holding in *CDK Contracting Co.*, 308 NLRB 1117 (1992), is controlling in this case. In *CDK*, we harmonized our holding with the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992). We find no merit to the Respondent's and amicus' contention that *CDK* was wrongly decided or is in conflict with *Lechmere*.[4]

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[3] Turnwald was accompanied by Robert Horner, a representative of a Lathers local of the Carpenters and Joiners Union. The judge also found that the Respondent unlawfully interfered with Horner's access to employees he represented. The access provision on which the judge relied is contained in a 1989 contract between Lathers Local 1028 and Acoustical Arts. In 1996 Local 1028 merged into Local 1045 of the Carpenters and Joiners Union. There is insufficient evidence in the record to find that the access provision in the 1989 contract remains in effect. Therefore, we do not adopt this violation. We shall modify the conclusions of law, recommended Order, and notice to reflect the violation we are finding.

[4] In such cases as this one, where the exercise of Sec. 7 rights by nonemployee union representatives is assertedly in conflict with a respondent's private property rights, the respondent bears a threshold burden to establish that it possessed a property interest which entitled it to exclude individuals from the property. See *R&R Plaster & Drywall Co.*, 330 NLRB No. 22 (1999); *Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997), enfd. 187 F.3d 1080, 1095 (9th Cir. 1999). The judge did not address whether the Respondent

We also find no merit to the Respondent's contention that the Union was not entitled to access because there were no Acoustical Arts carpenter employees on the jobsite on October 14. The access provision of the contract does not restrict the Union's visitation right to days when employees it represents are present at the jobsite and, moreover, the purpose of Union Official Turnwald's visit on October 14 was, as noted above, to investigate a safety complaint lodged by a union member who worked on the jobsite the day before.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3.

"3. Respondent violated Section 8(a)(1) of the Act when it unlawfully refused and otherwise interfered with Local 706, United Brotherhood of Carpenters & Joiners of America, AFL-CIO's right to enter the Cinema Hollywood jobsite."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Wolgast Corporation, Saginaw, Michigan, its officers, agents,

---

met that burden here. However, no party has excepted to the judge's failure to address this issue. Additionally, as indicated above, we are adopting the violation found by the judge with respect to Local 706, and ordering the Respondent to cease and desist from interfering with Local 706's right to enter jobsites to communicate with represented employees and from interfering with the exercise of Sec. 7 rights in any like or related manner. Under these circumstances, we find it unnecessary to pass on the issue of the Respondent's property interest.

successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Unlawfully refusing or otherwise interfering with Local 706, United Brotherhood of Carpenters & Joiners of America, AFL-CIO's right to enter the Cinema Hollywood jobsite or any other jobsite for the purpose of representing employees under its collective-bargaining agreement with the Union."

2. Substitute the following for paragraph 2(a):

"(a) On the Union's request, permit it to enter the Cinema Hollywood jobsite or any other jobsite for the purposes of representing the employees of Acoustical Arts, Inc. under its collective-bargaining agreement with the Union, provided, however, that Respondent is not prevented from applying reasonable and nondiscriminatory rules pertaining to nonemployee access."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. June 5, 2001

Wilma B. Liebman,	Member
John C. Truesdale,	Member
Dennis P. Walsh	Member

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 01-1904
NLRB Case No.: 7-CA-42474
[Filed June 29, 2001]

WOLGAST CORPORATION,
Petitioner,

-and-

NATIONAL LABOR RELATIONS BOARD,
Respondent.

DAVID JOHN MASUD (P37219)
Masud, Gilbert & Patterson, P.C.
Attorneys for Respondent
4449 Fashion Square Boulevard
Saginaw, Michigan 48603
(989) 792-4499

JOSEPH CANFIELD
Counsel for the General Counsel
National Labor Relations Board
Region 7
477 Michigan Avenue - Room 3 00
Detroit, Michigan 48226
(313) 226-7678

PETITION FOR REVIEW

Wolgast Corporation, hereby petitions this Court for review of the Order of the National Labor Relations Board affirming the administrative law judge's rulings, findings and conclusions as modified, and adopting the recommended Order of the administrative law judge as modified which was entered on June 5, 2001. Petitioner brings this petition pursuant to 29 USC § 160(f).

Dated this 26th day of June, 2001.

Respectfully submitted,

MASUD, GILBERT & PATTERSON, P.C.
Attorneys for Respondent

BY:/s/_____
DAVID JOHN MASUD (PS7219)
4449 Fashion Square Boulevard
Saginaw, MI 48603
(989) 792-4499

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE 7-CA-42474
[Filed October 25, 2000]

WOLGAST CORPORATION	)
	)
and	)
	)
LOCAL 706, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO	)

ORDER TRANSFERRING PROCEEDING TO THE NATIONAL LABOR RELATIONS BOARD

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.,

IT IS HEREBY ORDERED, pursuant to Section 102.45 of National Labor Relations Board's Rules and Regulations, that the above-entitled matter be, and it hereby is, transferred to and continued before the Board.

Dated, Washington, D.C., October 25, 2000.

By direction of the Board: John J. Toner
Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Rules and Regulations appearing on the pages attached hereto. **Note particularly the limitations on length of briefs and on size of paper, and that requests for extension of time must be served on the parties in the same or faster manner as used in filing the request with the Board.**

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board's Office of The Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570, on or before NOVEMBER 22, 2000.

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD DIVISION OF JUDGES

Case 7-CA-42474
[Decided October 25, 2000]

WOLGAST CORPORATION	)
	)
and	)
	)
LOCAL 706, UNITED BROTHERHOOD	)
OF CARPENTERS & JOINERS OF	)
AMERICA, AFL-CIO	)
	)

Joseph Canfield, Esq.,
for the General Counsel.

David John Masud, Esq.,
(Masud, Gilbert, & Patterson, P.C.),
of Saginaw, Michigan,
for the Respondent.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge: On October 14, 1999 Local 706, United Brotherhood of

Carpenters and Joiners of America, AFL-CIO, filed a charge in Case No. 7-CA-42474 against Wolgast Corporation, herein Respondent.

On December 28, 1999, the National Labor Relations Board, by the Regional Director for Region 7, issued a Complaint which alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act, herein the Act, when on October 14, 1999 Respondent unlawfully interfered with the rights of the charging party union, Local 706, and Local 1045 of the United Brotherhood of Carpenters and Joiners, to access to a jobsite under contractual provisions the Unions had with Accoustical Arts, Inc., a subcontractor working for Respondent on the Cinema Hollywood jobsite in Birch Run, Michigan. According to the Complaint Respondent interfered with the Unions' right to access by actions including ordering the Unions' business agents off the jobsite, attempting to forcibly lead a union agent off the jobsite and blocking his ingress into an area on the jobsite, and physically disrupting the activities of the Unions' agents and their interactions with employees.

Respondent filed an Answer in which it denied that it violated the Act in any way.

A hearing was held before me in Saginaw, Michigan, on March 30, March 31, and June 13, 2000.

I find for the General Counsel and conclude that Respondent violated the Act as alleged in the Complaint.

Based on the entire record in this case to include post hearing briefs submitted by the General Counsel and Respondent on August 1, 2000 and upon my observation of the witnesses and their demeanor I make the following

I. Findings of Fact

At all material times, Respondent, a corporation, with an office and place of business in Saginaw, Michigan, has been engaged as a general commercial contractor in the construction industry.

During the calendar year ending December 31, 1998, Respondent purchased goods and materials in excess of $ 50,000 from points located outside the state of Michigan and caused said goods and materials to be shipped directly to its building sites within the state of Michigan.

Respondent admits, and I find, that at all material times, Respondent has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Respondent also admits, and I find, that at all material times, a contract between Respondent and Accoustical Arts, Inc., has been in effect whereby Accoustical furnishes construction services to Respondent at the Cinema Hollywood jobsite, located in Birch Run, Michigan.

II. Labor Organizations Involved

Respondent admits, and I find, that at all material times, the Charging Party Union and Local 1045, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein collectively called the Unions, have been labor organizations within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practice

A. Facts

Respondent, a general contractor, had an $ 800,000 contract to add four theaters to a Cinema Hollywood movie complex in Birch Run, Michigan.

Respondent is non-union and had 10 subcontractors working for it at the Cinema Hollywood jobsite. One of the subcontractors was Accoustical Arts, Inc., which had a $ 80,000 contract with Respondent to perform certain accoustical work at the jobsite. The contract between Respondent and Accoustical Arts was a bid contract (so much to do the job) rather than a time and material contract.

Accoustical Arts has contracts with the two Locals involved in this case, which contracts were in effect in October 1999.

Accoustical Arts' contract with the charging party union Carpenters Local 706 contains in Article V Section (c) the following language:

> "Business Representatives shall have access to all jobs at all times where possible. A Representative of the Michigan Regional Council of Carpenters shall have the right to visit the job during working hours to interview the Employer, Steward, or men at work but shall not hinder the progress of the work."

Accoustical Arts had a contract with Carpenters Local 1028-L, which merged into Local 1045. In its contract with Local 1028-L and then with Local 1045 once Local 1028-L

merged into Local 1045 contained the following language in Article VIII Section 1:

> "Authorized representatives of the Union shall have the right to visit the job or jobs of the Employer where journeymen Lathers and Apprentices are employed, to investigate conditions at any time, but they shall not interfere with the progress of the work. The Contractor shall not be held liable for any representative of the Union visiting the job."

Both Local 706 and Local 1028-L, which later merged in 1996 into Local 1045, were Locals under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Carpenters and carpenter apprentices were members of Local 706 and lathers and lather apprentices were members of Local 1045. Both Locals should shared space in the same office in Saginaw and the same secretary in that office handled the paperwork for both Locals.

GC Exh. 2A is the controlling contract between Accoustical Arts and Local 706. GC Exh. 2B is the controlling contract between Accoustical Arts and Local 1028, which later became Local 1045 as reflected in GC Exh. 14. GC Exh. 4 is the signatory page wherein Accoustical Arts agreed to be bound by GC Exh. 2B.

Respondent Exhibit 2 is a contract between Accoustical Arts and Local 1045 which covers parts of the state of Michigan not involved in this litigation. As GC Exhs. 5 and 6 (Fringe Benefit Reports) and the testimony at trial reflect it was GC Exh. 2B which was the applicable contract governing lather and lather apprentice employees of Accoustical Arts in October 1999 at the Cinema Hollywood jobsite.

B. Events on October 13 and October 14, 1999

The unfair labor practice allegations are alleged to have occurred on October 14, 1999. But the events of October 14, 1999 are best put in perspective by looking at the events of both October 13 and October 14, 1999.

The Union went to the Cinema Hollywood jobsite to visit employees of Accoustical Arts, Inc.

Accoustical Arts was at the site between the first week in October and November 12, 1999 when the job ended. The Union visited the site on only October 13 and 14, 1999.

This is a case that turns in large part on credibility. The principal witnesses for the General Counsel on what occurred on October 13 and 14, 1999, are Leon Turnwald, an organizer for Local 706, and Robert Horner, an organizer out of Local 1045, a statewide local, but assigned to the Local 706 area of Michigan which includes Saginaw and Birch Run. I found both Turnwald and Horner to be very credible witnesses. They impressed me as honest men and I credit their testimony.

On October 13, 1999 Turnwald and Horner visited the Cinema Hollywood jobsite around 11 AM. They went there to see a new member of Local 706, Ray Cotton, who had just started work for Accoustical Arts to see how he was getting along and to look for a couple of other members, Mark Bigelow and Rusty Schroder, to see if they were working at that jobsite. Neither Bigelow nor Schroeder were working at that site and Ray Cotton had shown up to go to work but left the job before Turnwald and Horner got there according to foreman Tim Paquette.

According to Turnwald he encountered Brian Grandy at the jobsite and had a confrontation with him. Again, this is October 13 and the unfair labor practice is alleged to have occurred on October 14. Brian Grandy was the project superintendent for Respondent and is admitted by Respondent to be a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act.

According to Turnwald, whom I credit, the following occurred:

> "A [Brian Grandy] was up a little ways: There's a long hall way that leads into the main room and he was coming down the hallway.
>
> Q When, if ever, had you seen Mr. Grandy before?
>
> A I believe I had met him sometime ago. It would have been on National City Bank on Michigan herein Saginaw.
>
> Q Was that a job site-
>
> A Yes.
>
> Q - you're referring to?
>
> A Yes.
>
> Q Okay. So what conversation, if any, was there between you and Mr. Grandy at that point?
>
> A He recognized me for whatever reason and he was just, you know, what're you doing here, what'd you want, get your business done and get out.

Q What time did you leave that job site that day?

A We weren't on that job site that day more than ten minutes and I say ten minutes. You know, it must have taken that long, but, really, in everything that went on, it had to have been less than ten."

Later that day Turnwald called Ray Cotton and asked why he left the job. Cotton told him that he would be required to work on scaffolding that he (Cotton) thought unsafe.

Turnwald later spoke with John Binder, the owner of Accoustical Arts, who said the scaffolding was safe. And Turnwald also learned that they could have and should have signed up Kevin Culbert, a new employee of Accoustical Arts.

The following day, October 14, 1999, Turnwald and Horner went back to the Cinema Hollywood jobsite in order for Turnwald to check on the scaffolding and for Horner to sign up Keith Culbert into the Union as an apprentice lather.

According to Turnwald, whom I credit, this is what happened when he and Horner arrived at the jobsite and encountered Brian Grandy:

"Q Okay. And was there a conversation with Mr. Grandy at that time?

A Yes.

Q What did he say?

A He- he started- he started ranting and raving. He said what the fuck are you guys doing here again.

Q What was his tone of voice?

A Very, very loud. Very angry. Very abusive.

Q How long were you on the job site when you ran into Mr. John Grandy?

A It couldn't have been over a minute or two.

Q Okay. What else do you remember him saying?

A You know, he, basically, he was just screaming, you know, what was our business there and to get the fuck out of here, and I said, well, we've got to talk to our members, and he said you talk to those ass holes out in the parking lot, and I said no, I'm going to talk to them here, and he started screaming that he was going to call Pat Wolgast and he would throw me out.

Q What, if- what, if anything, else do you remember him saying?

A I reached in my pocket and tried to hand him a quarter and I said here's a quarter, go call Pat, I've got work to do.

Q Other than Mr. Grandy screaming, I think you described-

A Yes.

Q - what, if anything else-was there any other conversation?

A He grabbed on my arm and tried to lead me down the hallway on the way out.

Q When you say grabbed on your arm, what do you- can you describe for the court how he did that?

A Just he was standing in front of me. He grabbed at my arm to pull me.

Q He grabbed at your arm with his hand?

A Right.

Q One hand or two hands?

A One hand.

Q Okay. And you say he sort of pulled you?

A Yes.

Q Pulled you where?

A Tried to pull me down the hall.

Q And what happened?

A I just brushed it off and at that time Mr. Horner came through and kind of stepped in between us.

Q Ad what happened then?

A He says don't worry about giving him a quarter, he's got a cell phone, he can go make a call.

Q Okay.

A And Mr. Grandy turned around and walked down the hallway the other way.

Q Other than touching you that, day, who else. If anyone, did Mr. Grandy touch?

A I believe Mr. Horner, because, when he came in, he- he was talking to Mr. Horner as he came down the hallway to-towards me.

Q Okay. When you say you believe, did you see that?

A Yes. Because they- they turned the corner and they were both right there.

Q And I asked if he touched anyone else and you said Mr. Horner. In what manner did he touch Mr. Horner?

A I believe he was leading Mr. Horner into that room.

Q By leading, what do you mean?

A By the arm.

Q So you say you- Did you hand Mr. Grandy a quarter or no?

A No. I reached out to gesture and he didn't take it.

Q What happened then?

A Then we came back. The gentleman-

Q Let me ask you what happened with Mr. Grandy and yourself then. Did you remain together?

A No. Mr. Grandy walked back up the hallway.

Q Okay. So where did you go then?

A Back into the main room. The- who I found out later to be Kevin Culbert came back into the room and I asked him who he was and he was the new hire for Accoustical.

Q Kevin Culbert?

A Yes. I believe that was it.

Q And so what happened when you went into the main room?

A We had some paperwork there for him to fill out. His member-

Q Mr. Culbert?

A Yes.

Q Okay.

A His membership and, oh, his health benefit cards and a form for the apprenticeship. He was coming in as an apprentice and he had to fill out this form for that. So there was a make- shift table. Below the table I believe it was bats of insulation, some things like

that, a large piece of plywood or some kind of Durasand board or something that we was using for a tabletop and he commenced to fill out the paperwork.

Q Okay. And, while he was doing that, was, if anything happened?

A I believe sometime in the process of doing that the owner of Accoustical Arts came in, Mr. Binder, and he set his tools down on there. There were screws and other things and-

Q Mr. Binder set his tools down?

A Yes. He carried in his tool belt. And there was some screw guns there and some other things.

Q So that Mr. Binder comes in, lays his tools down on this make-shift desk top, and Mr. Culbert is filling out the papers?

A Yes.

Q Did you- was there a conversation with Mr. Binder about you and Mr. Horner?

A Mr. Horner had a conversation with him like that.

Q And where did that occur?

A I believe at that moment those two walked outside to get away from the men there and walked outside the door and went outside the building.

Q Did you have occasion to talk to Mr. Binder and Mr. Horner outside?

A Just briefly.

Q And what caused that?

A In the process of filling out all the paperwork, all the paperwork was fine except for there was a portion of the apprenticeship. This gentleman was coming in as a lather's apprentice and the lather's apprenticeship school is a little bit different program than the carpenter apprenticeship program is. There was some questions on there that weren't clear to me. So I exited the building to ask Mr. Horner how he should finish filling that out.

Q And what happened then?

A Mr. Horner explained to me and he said, well, I'll come back in and show him how do it, and we turned around to go back into the building.

Q And, going back into the building, you were entering through what?

A Through the same exit door on the side there.

Q Okay. And what happened then?

A Mr. Grandy was standing in the doorway and just, you know, you guys get the fuck out of here, you're not coming back in.

Q Do you remember anything else he said?

A I told him we've got work to do in there, and he says, again, if you gotta talk to those ass holes, do it out in the parking lot?

Q Do you remember anything else that he said then?

A Just that, if they gotta fill out paperwork, they can do it out in the parking lot, and I said it's a lot warmer in here and I pushed him aside and went back in.

Q Is there anything else you remember being said then?

A I just told him I had business to complete in there, I had to go back in and get the paperwork. That's about it.

Q Okay. So you don't remember at this point other things being said?

A No.

Q What, if anything, do you remember Mr. Grandy saying about disrupting work?

A Right. He had mentioned in through that that you're not going to disrupt, you're not going to stop my guys from working, you're not going to disrupt this job site, and I told him these are not your guys and we're not disrupting the job site and we're not going to bother anybody here, we're not going to be holding anybody up from doing their work.

Q At that point, how long were you on the job?

A At that point, possibly- possibly- seven to ten minutes.

Q Okay. When, if ever, did you have any conversations with any of the contractor's employees?

A It was just a little bit. Maybe then- They kept-

MR. MASUD: Excuse me. What contractor?

MR. CANFIELD: The contractor's employees.

MR. MASUD: Which contractor?

MR. CANFIELD: Thank you.

Q BY MR. CANFIELD: When, if ever, did you have any conversations with Wolgast employees?

A Yes. At- at about that point, Mr. Grandy came down with a person that he called Keith and he said to Keith tell him- referring to me- tell him to get out of here, get off the job site, he can't be here.

Q And what did Keith say?

A And Keith he just kind of looked at me and rolled his eyes and he said you guys go something to do here, and I says, you know, we're here representing our members, we've got to sign a guy up, we're taking care of union business, and he said something to the effect did you check in, and I says, if we were supposed to check in, it seems like he would have told me that yesterday and we're not checking in, we're going to get this done and go. Keith said he can't

throw you off, and Keith walked around to the back and went up and he had a hog grinder. He was grinding some metal.

Q What a hog grinder?

A It's a large disc grinder.

Q Okay. Keith says he can't thrown you off?

A Yeah.

Q Who did you understand him to be referring to?

A Brian.

Q Okay. Do you know who Keith was?

A I would say by the nature he may have been a little- a cement man, a cement finisher?

Q So you don't know who he was?

A No, I don't.

Q Okay. So other than Mr. Grandy and, perhaps, Keith, what other Wolgast employees, if any, did you have any conversations with?

A I didn't have any other conversation with any. I only recognized what I thought to be one other Wolgast on that job and that was a younger guy, dark complexioned, rather large.

Q Did you have any conversation with him?

A No.

Q Okay. So- okay- so let's see. Did the conversation with Grandy and Keith occur after Mr. Grandy was standing in the doorway saying you're not going to come in?

A I believe that was before that.

Q So, when Mr. Grandy was standing in the doorway saying you're not coming back in, what happened?

A I told him I had to go in there and get my paperwork and Finish that up, and leaned to one side and I brushed by him, because I made a gesture like I was going to go in close and he leaned that way and, as soon as he did that, I just blew by him.

Q And what happened when you went inside?

A We went in there, instructed the apprentice on how to complete finishing it out. There was some conversation as to how much the books would cost, and Mr. Grandy said something to the effect as that's all the fucking union does is take your money, and the young gentlemen filling it out says no, the union's the only way I can get ahead. And we said, boy, you're going to make a great guy, and then Mr. Grandy stated, well, you said to me you wouldn't interfere with anything I had to do here, you weren't going to bother the men, and I said, well, that's right, and he says, well, then, I'm going to clean up this area right here and he reached down and grabbed the work table

and flipped it up in the air so all the tools and everything would fall on me.
Q Other than the tools, what else was on the work table?

A My hard hat was sitting on the work table. There was screws sitting on the work table. Different things like that.

Q Where was the paperwork that Mr. Culbert had filled out?

A That was on there. He was in the process. He wasn't completely done with the paperwork.

Q So what was Mr. Culbert doing when Mr. Grandy flipped over the table?

A He was down on his knees. Like he had to be down quite low to be filling out the paperwork.

Q So he was- he continued- he was continuing to fill out the paperwork when Mr. Grandy flipped the table?

A He may not have been actually writing, but the paperwork wasn't completed and that's where he was, in the process.

Q And he was still on his knees at the table?

A Yes.

Q And what happened with the- what kind of table top was it? Can you described it?

A Again, I think it might have been a piece of- it may have even been a piece of drywall.

Q How big?

A 4 x 6. Something. I wasn't- it wasn't a full sheet. If it was a piece of plywood, it was- it was quite dusty. You know, it had to have been in there and, again, it wasn't a full sheet.

Q So what happened to the table top when Mr. Grandy flipped it?

A It fell down in front of me. It just caught the edge of my shoes, but the tools and everything fell on me.

Q And what happened next?

A And I just, you know, said that was a really a smart thing to do. Mr. Binder came in there and he just kind of stepped in between us and he says, you know, you guys do whatever you gotta do, but these are my tools, you know, let's not be wrecking them. And he-he picked them up.

Q And then what happened then?

A Mr. Grandy walked up the hallway and he was up there doing something. The apprentice finished clean- or filling out his paperwork and we left.

Q Okay. And how long were you on the site, in total, by the time you left?

A It had to be less than 15 minutes."

Robert Horner's version of events on October 13, 1999 was as follows:

"Q What time of day did you go?

A It was before lunch sometime.

Q And what was your purpose of going there?

A My purpose in going there was to see Ray Cotton and-

Q Who was-

A - and to look for Rusty Schroeder and Mark Bigelow.

Q What was the purpose of seeing Cotton, though?

A I had sent him- He had transferred in here from Ohio and I don't remember the town where he transferred, but he had transferred in and I was the only one in the office when he came in that very first day and I told him we could use some ceiling guys and that's what he had expressed to me that he was and I had sent him to two or three different subcontractors and he seemed to last a day or two and then would either not show up or would get laid off and I wanted to check to see how he was doing for John.

Q Okay.

A See if there was no problems.

Q By John, you mean John Binder?

A John Binder, yeah.[1]

Q Okay. So, when you got there, let's see, you went into the building, is that correct?

A Yes, sir.

Q And who did you speak to first?

A Mr. Grandy.

Q And was that in- Where did that occur?

A It was in the hallway.

Q And what is it that was said?

A He asked me who I was and I told him, I introduced myself, and asked him where Accoustical Arts guys were at and he said he wasn't sure. We walked down the hall and turned the corner and I saw Tim Paquette, who works for Accoustical Arts, in a big, rather large room.

Q Okay. And, when you went in, who'd you speak to?

A Tim.

Q And who was there speaking to Tim besides yourself?

---

[1] John Binder is the owner of Accoustical Arts.

A I believe Leon had found him by now.

Q Okay.

A I think he went in another door.

JUDGE LINSKY: What's Tim's last name again?

THE WITNESS: Paquette

JUDGE LINSKY: Do you know how to spell that?

THE WITNESS: P-a-q-u-e-t-t-e.

JUDGE LINSKY: Oh, yeah. Okay.

Q MR. CANFIELD: And what was the conversation with Mr. Paquette?

A I asked him where Mr. Cotton was and he explained to me that he got there in the morning and Ray was there- Mr. Cotton was there. He explained to Mr. Cotton what had to be done and Tim said, you know, he said his tools were out in the truck or whatever and Tim went into the next room or whatever and came back and Mr. Cotton left. I guess deciding that it was unsafe to work, I found out later.

Q So your understanding with it at that point when you first spoke to Mr. Paquette he didn't know Mr. Cotton had left?

A No. He knew he had left. He said he just turned around and he never- and he went outside to get his tools or whatever and-

Q I see.

A - and, he came back, there was- he was not found.

Q Other than Mr. Grandy telling you or asking Mr. Grandy where the Accoustical employees worked, what other conversations, if any, did you have with Mr. Grandy?

A He said just get your business done and, you know, please, leave, and I said, well, it's only going to take a second and I'll be gone.

Q What was his tone of voice when he said that?

A It was okay. It wasn't- it was- it was a little bit, maybe, agitated would probably be the best word.

Q Where were you when he said that? What were you doing then?

A In the hallway.

Q And what were you doing at the time?

A Trying to find the Accoustical Arts people.

Q So that's when you first walked in?

A Yeah, that was when I first walked in the door.

Q How long were on the job, on the site, altogether that day?

A Total from the time we drove in to the time we drove out, maybe ten minutes.

Q Okay. Did-

JUDGE LINSKY: Now was- Cotton was going to be a 1045 member or-

THE WITNESS: No. He was a- he was a Carpenter member.

JUDGE LINSKY: Okay.

THE WITNESS: But I, like I say, Leon takes care of my members, I take care of Leon's members. It's a- it's a mutual thing. They all fall under the Carpenter umbrella and, because I had had first contact with Mr. Cotton, he knew me and so, when he would call for job placement or what-have-you, he would always ask for me because I had made the initial contact with him and he felt comfortable with me.

JUDGE LINSKY: Okay.

Q BY MR. CANFIELD: And, by Carpenters, you mean Local 706?

A Right.

Q And, when you use the term Carpenters, that's what we're referring to, is that correct?

A Correct.

Q Okay. Did you have an occasion- did you have an occasion to talk to Mr. Paquette later that night?

A Yeah. He had called me at home and said, oh, by the way, when you were there, you could have signed up Kevin Culbert and I said who's he and he said, well, you know we talked about- I talked to you about him a week or so ago and I just neglected to think about it when you were there, but can you come down tomorrow and sign him up, and I yeah, that's not a problem.[2]

Q So who is Kevin Culbert?

A He is the apprentice that I signed up on the following day, the 14th.

Q A new employee?

A A new employee, yes."

Horner went on and testified about a conversation he had with Ray Cotton. Horner testified as follows:

"Q Okay. Was there a conversation with Mr. Cotton that night also?

---

[2] Tim Paquette was the foreman for Acoustical Arts and a member of Local 1045.

A Yes. After we left the job site, I dropped Leon off at the office and I went to look for Ray Cotton because I couldn't raise him on the phone. I think he was a little bit embarrassed. I tried calling him on his phone and, when he heard my voice, he hung up. And so I thought, well, I'll- I didn't know where he lived, but I knew the general vicinity, you know, the apartment complex, and I thought, well, I'll find his truck and then I'll find him and that's exactly what happened and I asked him why he left and he told me why he left and it was over a safety issue.

Q Did he say what it was?

MR. MASUD: I would- Objection. Hearsay.

JUDGE LINSKY: Okay. The same ruling. It's not for the truth of the matter stated. Just their-

MR. CANFIELD: Yes, Your Honor.

JUDGE LINSKY:-statement as to what prompted possible further action on their part.

A Yeah. He said that he was scared to- or he felt unsafe working on a scaffold that was kind of a make-shift deal with no handrails and no way to really tie yourself off above because the deck of the building was a little bit too high to get anything tied up there and he said he'd never encountered that before where he worked down in Ohio and he- he just didn't feel safe working off of that, and I said, okay, and that was it."

Robert Horner's testimony as to what occurred when he and Turnwald returned to the jobsite on October 14, 1999 was as follows:

"Q Now on October 14th did you go back to the Accoustical job site at Birch Run?

A Yes.

Q And who went with you?

A Leon Turnwald again.

Q Approximately what time did you go?

A Before lunch again.

Q Okay. And what is- what is the reason that you were there?

A To sign-

Q Why did you go?

A To sign up Kevin Culbert.

Q And what do you remember is the reason Mr. Turnwald was there?

A To check out the safety- the safety concerns of one of his members.

Q That would be Cotton?

A Yes.

Q So did you enter the building?

A Yes.

Q And who did you speak to initially?

A Mr. Grandy again.

Q Okay. And what did Mr. Grandy- Where did you see Mr. Grandy? Where did you meet with him?

A In the hallway again. Just trying to find Accoustical Arts, I think I popped my head in one little room and stuck it out and Mr. Grandy was coming towards me and didn't have a look- didn't have a happy look on his face.

Q And what was said? What did Mr. Grandy say?

A What the fuck are you guys doing here again.

Q Okay. Do you remember anything else he said?

A Yeah. He asked me to leave and I told him I had to sign up a member.

Q Okay.

A Or not a member yet, but I had to sign up a guy.

Q Okay. Other than a verbal communication, was there any kind of- anything else happen?

A Yeah. He grabbed me- he grabbed me by like the arm or by the elbow area and said, you know, leave,

and I said no, I've got to sign up a guy and I'll- and I'll, you know, just give me a little chance here and I'll- I'll get it done and I'll get out of here.

Q Okay. Okay. Where did you go then? You were in the hallway and then where did you go?

A I believe it was to the room that we were in the day before.

Q Okay. And who went in?

A Mr. Grandy was following close on my heels.

Q Okay. And who else was with you?

A Nobody. Leon was in that room.

Q Okay. Did you and- did you and Mr. Turnwald have anything to say to each other at that point?

A Yeah. I told him, Leon, I said, hey, this guy wants us out of here, and he said, well, when we get the guys signed up, we will- we will go as soon as I look at the safety thing.

Q What did Grandy say to that?

A You know, you guys get out of here, and he just kept hammering on get out of here, get out of here, and he was going to call Pat Wolgast and-

Q What, if anything, do you remember about Mr. Grandy saying where you should take the person and sign him up, though?

A Yeah. He said take him outside and sign him up and I said it's much too cold out there to- too cold and too windy, we're trying to fill out paperwork, they'll be blowing all over and, you know, we gotta- why not just do it right here and we'll get out of your hair.

Q And you said - I think you testified Mr. Grandy kept on saying get out of here, get out of here. Did he say get out of here or get the fuck out of here?

A Well, there's a lady present I

Q You've got to say what he said.

A Yeah. He said get the fuck out of here.

Q And what was his tone of voice?

A It was very agitated. He was very angry.

Q And think I think you said that he - you testified he said he would call Pat Wolgast, the owner.

A Pat or whoever. Pat or Lynn, yeah.

Q Okay. Was there any- do you remember any conversation in regards to his suggestion that he was going to call Wolgast?

A Yeah, he said he was going to call Pat Wolgast and Leon reached in his pocket, grabbed a quarter, and said here, gesturing to take the quarter and go call him, and I said, Leon, he doesn't need that, I've got my cell phone, he can use my cell phone.

Q Okay.

A And then he refused.

Q Now who is John Binder?

A John Binder is the owner of Accoustical Arts.

Q And was Mr. Binder- was Mr. Binder present that day at any point?

A Yeah. He walked into the room at some point.

Q And what'd he do when he walked in the room?

A I went over and approached him. He laid down his tools on the- next to where Kevin was filling out his paperwork and-

Q Okay. Tell us why Kevin was filling out the paperwork. What was that? Where was that?

A It was in kind of- I don't know- if this were the room, he'd be seven or foot off the wall, nine foot off the wall, and there was a bundle of insulation with, I believe, a piece of ply- or drywall on it that- and we just kind of wiped off so that, when you were writing on the piece of paper it wouldn't get it all damaged.

Q Okay. So-

A And that's where John laid his tools was on that piece of drywall or whatever it was. Right next to where he was filling it out.

Q So did you and Mr. Binder have a conversation?

A Yeah. I asked John to step outside. I wanted to talk with him about the safety concerns that Mr. Cotton had had and I wanted to ask him how Ray did while he was there and, obviously, he wasn't there long enough to do anything.

Q Okay. And, while you were talking, did anyone else join you?

A At some point, Leon came out and said Kevin's got a question on this thing here, you know, what do I- what do you want me to have him put down, and I said, well, I'll be right in there and we turned and started to head back into the building and-

Q What happened then?

A Mr. Grandy was standing in the doorway and he said you guys stay out here and fill it out and, I don't know, I- I think Leon said, well, he's in there filling the stuff out and, just like Leon said,[3] he went this way and Grandy kind of went that way and he just kind of shot through and then he turned and followed them and so the door was open and-

Q I want to understand. Mr. Grandy's standing in the doorway. How much of the doorway does he occupy?

---

[3] No party requested the sequestration of witnesses pursuant to FRE Rule 615 and most of the witnesses for both sides were in the hearing room during the trial.

A Half, maybe.

Q Okay. And where's he standing? In the center? On the side? Where?

A Well, I don't- I really don't remember.

Q What do you remember about his body position? How was that?

A He was physically trying to block the door from us coming back in.

Q How was he doing that?

A Just standing in the door telling us we couldn't re-enter.

Q Now you said that Leon went one way and Mr. Grandy went another. You mean like Mr. Grandy went the same direction that Leon went?

A Yeah. He tried to block. You know, he thought Leon was going to come in this way and then Leon just did a fast shuffle and shot in.

Q Okay.

A And then Mr. Grandy turned and followed him and then I didn't have to do anything. I just walked through the opening.

Q Okay. And what happened? What did you see when you walked in? What happened then?

A Kevin was still filling out the paperwork. I leaned over to explain something to him and Mr. Grandy said, well, I've got to clean up this area now and he just picked up the sheet of drywall or piece of plywood or whatever it was and threw everything.
Q He threw the piece of drywall. How far?

A He flipped it over. It physically, you know, it didn't- it stood up and then landed back over again. So it was a pretty good-

Q Well, what happened to the- Mr. Binder's tools that were on there?

A They- everything went flying.

Q Everything?

A Everything.

Q And about the paperwork that Mr. Curwald had been filling out?

A JUDGE LINSKY: Mr. who?

Q BY MR. CANFIELD: (continuing) The new member.

A Kevin?

Q Yeah.

A Kevin, I don't remember if he'd got that off just in time or if it fell in the floor and we had to pick it up.

Q Where was-

A I'm not sure.

Q Where was Kevin when Mr. Grandy picked up the top of the drywall and threw it at Culbert?

A Right within a foot or two of it.

Q What happened after- what happened after the paperwork was completed?

A We- I exited the building from that.

Q How long were you on the job site in total?

A Maybe ten- maybe fifteen- at the outset- minutes."

Respondent's principal witness was Brian Grandy. I observed Grandy on the stand briefly on March 31, 2000, when we had to declare a recess for reasons unrelated to the issues in this case, and again on June 13, 2000, when Grandy testified at length about the events of October 14, 1999.

Again, I found Leon Turnwald and Robert Horner to be very credible witnesses and insofar as Grandy's testimony varies from their testimony I credit Turnwald and Horner over Grandy.

Grandy testified that visitors to the jobsite such as Turnwald and Horner should first check in at the construction trailer and if no one is in the trailer they should seek out the person on site who is in charge and state their business. Further, only supervised visits would be allowed.

Grandy never told Turnwald and Horner on October 13 about these procedures however.

Grandy also testified that Turnwald and Horner were at the job site for 25 to 30 minutes on October 13 and for about 1 hour on October 14. I find that the time estimates of Turnwald and Horner to be more accurate.

According to Grandy, Turnwald asked him if he was happy working for Respondent. Turnwald credibly denied he asked Grandy that question.

In addition, Grandy testified that Turnwald and Horner did not have hardhats and were told they had to have them at the jobsite. Turnwald and Horner credibly testified that they had hardhats with them but that at no time did Grandy ever tell them they had to put on their hardhats.

Grandy concedes that on October 14 he immediately told Turnwald and Horner to sign up the new member outside or come back during the new member's lunch hour to sign him up.

The testimony at trial was that it was windy outside. The signing up of the new member would only take a few minutes and Grandy clearly interfered with the signing up of the new member.

Any disruption of work was caused by Grandy arguing with Turnwald and Horner and not by the conduct of Turnwald and Horner.

John Binder, the owner of Accoustical Arts, arrived at the jobsite and was told by Horner that they would be taking just 5 more minutes to sign up the new man and would be leaving.

Binder confirmed that new members are often signed up at the jobsite but are also occasionally signed up at the Union hall. In addition, Binder testified that since 1985 when he want into business the Union has always been coming on jobs.

Grandy conceded that the employees of Accoustical Arts would follow Accoustical Arts rules on when to take a break or a luncheon recess and that foremen of Accoustical Arts not foremen of Respondent would direct the work of Accoustical Arts employees on the jobsite.

Respondent tried to raise as a defense to its actions that the Union came to Respondent's jobsite to engage in "stripping", i.e., the union representatives would urge Respondent's employees to immediately leave the employ of Respondent and join the union and the union would immediately put them to work leaving Respondent without workers. However, while the Union may have engaged in stripping in the past, there is not a shed of credible evidence that they did so on October 13 or 14 or even intended to do so on these dates. I specifically discredit the testimony of Tom Murphy, an employee of Respondent, who claimed Turnwald asked him on October 13 if he was happy working for Respondent. I credit Turnwald's testimony that he never said that to Murphy.

Respondent was on the job from August 2, 1999 to November 12, 1999. In the $ 800,000 bid contract there was a bonus of $ 1,000 a day for each day the job was completed early and a $ 1,500 penalty for every day the completion of the job was late. Suffice it to say the less than 30 minutes the Union was on the site on October 13 and 14 did not materially impact the completion of work on this site. Indeed, if Grandy had not been so unreasonable, obnoxious and confrontational

the Union representatives would have been at the jobsite even less than the 30 minutes they were there over 2 days.

C. Legal Analysis

The Board law that controls in this case is *CDK Contracting Co.*, 308 NLRB 1117 (1992), in which a unanimous three member panel held that CDK Contracting violated Section 8(a)(1) of the Act by denying access to the jobsite to union officials seeking to communicate with employees of a subcontractor, who were represented by the union and where the subcontractor and union had an agreement containing a union access or visitation clause.

As the Board held in affirming Administrative Law Judge Timothy D. Nelson:

> "In its exceptions, the Respondent primarily contends that the principles set forth by the Supreme Court in *Lechmere, Inc. v. NLRB,* 112 S. Ct. 841 (1992), control this case. According to the Respondent, *Lechmere* dictates that the complaint allegations must be dismissed. For the reasons that follow, we disagree.
>
> In *Lechmere*, the Court denied private property access to nonemployee union agents who sought access for the purpose of communicating an organizational message to employees. Here, substantially different issues and considerations are before us. At issue here is whether a general contractor may deny access to a jobsite to union officials who seek to communicate with employees of a subcontractor represented by the union where a visitation clause in the contract between the subcontractor and the union permits access. As the

> judge reasoned, the Respondent by soliciting other employers to perform work at the jobsite, 'invited' subcontractors, and their respective subcontractors, onto the jobsite, and thus subjected its 'property rights to the Union's contractual 'access' rights with those subcontractors. Thus, the Respondent here, unlike the Respondent in *Lechmere*, voluntarily undertook to have work performed by unionized subcontractors on the property. In these circumstances, the Respondent was not privileged to interfere with the contractual obligations of the subcontractors and the contractual rights of the unions that represented subcontractor employees. We conclude that the Respondent must permit those contractors to observe their contractual obligations." 308 NLRB at 1117.

Accordingly, I find that Respondent, by Brian Grandy, violated Section 8(a)(1) of the Act by its behavior toward union representatives Leon Turnwald and Robert Horner.

Respondent can impose reasonable rules, e.g., a requirement that union representatives visiting a jobsite check in at the trailer or notify the person in charge of the jobsite of their presence at the jobsite provided, of course, that these rules on access are applied in a nondiscriminatory manner to all visitors.

The jobsite in this case was the interior of the building where the employees of Accoustical Arts were working and not the move complex outdoor parking lot. I find based on the credited testimony of Turnwald and Horner that they did not "hinder the progress of the work" or "interfere with the progress of the work."

Remedy

The project at the Cinema Hollywood jobsite ended before the hearing in this case began and the remedy for Respondent's violation should be a cease and desist order and the distribution by Respondent of an appropriate notice to the employees of Accoustical Arts who worked at the Cinema Hollywood jobsite.

Conclusions of Law

1. Wolgast Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 706 and Local 1045, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act when it unlawfully refused and otherwise interfered with the Union's right to enter the Cinema Hollywood jobsite.

Upon the foregoing findings of fact and conclusions of law and pursuant to Section 10(c) of the Act, I hereby issue the following recommended

ORDER[4]

Respondent. Wolgast Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully refusing or otherwise interfering with the Union's right to enter the Cinema Hollywood jobsite or any other jobsite for the purpose of communication with employees represented by the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On the Union's request, permit it to enter the Cinema Hollywood jobsite or any other jobsite for the purposes of communicating with the employees of Accoustical Arts, Inc. which it currently represents provided, however, that Respondent is not prevented from applying reasonable and nondiscriminatory rules pertaining to nonemployee access.

(b) Within 14 days after service by the Region mail to the employees of Accoustical Arts who worked on the Cinema

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[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

Hollywood jobsite at any time between August and November 1999 a copy of the notice marked "Appendix A."[5] Copies of the notice, on forms provided by the Regional Director for Region 7 shall be mailed after being signed by the Respondent's authorized representative.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.[6]

Dated, Washington, D.C. October 25, 2000.

/s/
Martin J. Linsky
Administrative Law Judge

---

[5] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[6] Respondent moved the admission of Respondent Exh. 2. The General Counsel had no objection. The record, however, does not reflect the admission of Respondent Exh. 2. Respondent Exh. 2 is hereby admitted and made a part of the official exhibits in this case.

APPENDIX

NOTICE TO EMPLOYEES

Mailed by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to mail this notice to the employees of Accoustical Arts, Inc., who worked in 1999 on the Cinema Hollywood jobsite in Birch Run, Michigan.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT unlawfully refuse or otherwise interfere with the Union's right to enter the Cinema Hollywood jobsite or any other jobsite for the purpose of communicating with employees represented by the Union.

WE WILL NOT in any like or related manner interfere with. restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL, on the Union's request, permit it to enter the Cinema Hollywood jobsite or any other jobsite for the

purposes of communicating with the employees of Accoustical Arts, Inc., which it currently represents provided. however, that we are not prevented from applying reasonable and nondiscriminatory rules pertaining to nonemployee access.

WOLGAST CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226-2569, Telephone 313-226-3244.

APPENDIX G

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Case No. 7-CA-42474
[Filed April 11, 2000]

In the Matter of:	)
	)
WOLGAST CORPORATION,	)
Respondent,	)
	)
and	)
	)
LOCAL 706, UNITED BROTHERHOOD	)
OF CARPENTERS AND JOINERS OF	)
AMERICA, AFL-CIO,	)
Charging Party.	)
	)

The above entitled matter came on for hearing, pursuant to notice, before MARTIN J. LINSKY, Administrative Law Judge, at the State Office Building, 411 E. Genesee, Basement Conference Room, on March 30, 2000, at 11:04 A.M.

APPEARANCES

On Behalf of the General Counsel:

JOSEPH CANFIELD, ESQ.
NATIONAL LABOR RELATIONS BOARD - REGION
7 Patrick V. McNamara Federal Building
477 Michigan Avenue
Room 300
Detroit, Michigan

On Behalf of the Respondent:

DAVID JOHN MASUD, ESQ.
MASUD GILBERT & PATTERSON, P.C.
4449 Fashion Square Boulevard
Saginaw, Michigan 48603-1242

On Behalf of the Charging Party:

LEON TURNWALD, ORGANIZER
MICHIGAN REGIONAL COUNCIL OF
CARPENTERS,
U.B.C.J.A. - A.F.L. - C.I.O.
1400 W. Genesee Avenue
Saginaw, Michigan 48602

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* * *

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call him twice. I just want to call him --

MR. MASUD: Oh. Yeah, that's fine. I have no objection, Judge.

JUDGE LINSKY:Okay.

MR. CANFIELD: Okay.

JUDGE LINSKY:You rest?

MR. CANFIELD: We rest, Your Honor.

JUDGE LINSKY:Okay. Mr. Masud.

MR. MASUD: Judge, I call Brian Grandy.

JUDGE LINSKY:If you'd raise your right hand, sir.

Whereupon,

BRIAN WILLIAM GRANDY

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE LINSKY:Please be seated.

DIRECT EXAMINATION

Q BY MR. MASUD: State your name and spell your last name for the record, please.

A Brian William Grandy. G-r-a-n-d-y.

Q And, Mr. Grandy, tell us where you work, your title, and your job duties as they existed on October 14th, 1999.

A I've worked for Wolgast Corporation for eight years now. General foreman.

Q And, briefly, what's a general foreman do for Wolgast?

A I've done -- I do everything and anything from building [p.310] layout to final clean up.

Q Okay. So you run the job, correct, for Wolgast?

A Yes.

Q All right. And Wolgast is -- Tell us a little bit about Wolgast. They're a general contractor, correct?

A Yes.

Q All right. And what kind of construction do they do?

A We do some construction management, some residential, some restaurant, lots of industrial.

Q And how many employees?

A A hundred.

Q Okay. And they're a non-union contractor, correct?

A Yes.

Q Okay. And you were the -- is it general foreman, is that correct?

A Yes.

Q All right. And you were the general foreman at the Hollywood Cinema job, right?

A Yes.

Q When did that job start?

A August --

Q Tell us when it started and when it ended.

A August 2nd-- it started August 2nd. Completion date was November the 12th.

Q Okay. And how big a job was that in terms of dollar [p.311] volume?

A Oh, I believe it was about $800,000.00.

Q Okay. And for a Wolgast, a typical Wolgast, job, is that a big one, small one, medium?

A Medium.

Q Medium. Okay. And how many Wolgast employees on that job?

A We started out with three and at one -- at the most, probably, 12 when we were doing the concrete work and carpenter work.

Q And how did Wolgast get that job?

A I believe it was negotiated. I think it was a negotiated bid.

Q And so it was a bid job?

A A bid job, yes.

Q Okay. And tell us the nature of the construction. Was it new construction? Was it an addition?

A It was an addition to an existing theater. We were adding four theaters.

Q Okay. And who was responsible for job safety and security on this job?

A I was. I was for Wolgast.

Q Okay. And who had control over the property site, including access of visitors?

A Wolgast.

Q Were subs -- other than Acoustical, were there other

* * *

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MR. MASUD: Brian Grandy.

JUDGE LINSKY: Would you raise your right hand, sir?

Whereupon,

BRIAN GRANDY

having been duly sworn was called as a witness and was examined and testified as follows:

JUDGE LINSKY: Please be seated.

MR. MASUD: Your Honor, I am just going to pick up where I left off. I am not going to repeat anything that is--

JUDGE LINSKY: Okay.

MR. MASUD: All right.

JUDGE LINSKY: This gentleman is the same witness who testified on the morning of March 31st, 2000. And we are no resuming with your testimony, sir.

THE WITNESS: Correct.

JUDGE LINSKY: Mr. Masud?

DIRECT EXAMINATION (continued)

Q BY MR. MASUD: Mr. Murphy, when we left off with the line of questioning from myself to you ---

JUDGE LINSKY: Mr. Grandy?

MR. MASUD: Yes, Mr. Grandy. I'm sorry.

JUDGE LINSKY: All right.

Q BY MR. MASUD: You were explaining to us, the different contractors, subcontractors, that were on-the-job, and who was Union and who was non Union, and so forth.

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With regard to the Union contractors the Hollywood Cinema job, were you aware that any of them had collective bargaining agreements?

A No. I was not aware of that.

Q Had you seen any of the collective bargaining agreements for the --- any of the subcontractors on that job?

A No.

Q Would you explain for us, please, what Wolgast's policy is concerning visitors to the job site?

A Our policy is that they should report to the job trailer, find the superintendent, or the guy in charge of the job.

Q Okay. And what if no one is at job trailer?

A They should ask the first person they see, who is in charge, and find that person.

Q All right. And what if someone is found in charge of the job, and the visitor wants to access the job site? What happens next?

A It would be a supervised visit only, if it was permitted.

Q And in the case of a Union business agent, how are their visits treated by Wolgast?

A Normally, we would ask what their business is, and set up something in the trailer for them, where they could talk with who they needed to talk with, or in the building, a room in the building, or whatever --- wherever worked best for everybody.

Q And other than the Carpenters' business agents, were

* * *

Supreme Court, U.S.
FILED
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No. 03-883

In the Supreme Court of the United States

WOLGAST CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner, a general contractor, committed an unfair labor practice by interfering with a union official's access to a common construction site in which petitioner had a property interest, when the union was the bargaining representative of the employees of a subcontractor hired by petitioner to perform work on the site, the subcontractor's labor agreement contained a union access provision, and the union official sought access to perform representational duties on behalf of employees represented by the union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-15a) is reported at 349 F.3d 250. The decision and order of the National Labor Relations Board (Pet. App. 16a-20a) and the decision of the administrative law judge (Pet. App. 25a-69a) are reported at 334 N.L.R.B. 203.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 2003. The petition for a writ of certiorari was filed on December 15, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. 157, guarantees employees, *inter alia*, the right "to form, join, or assist labor organizations [and] to bargain collectively through representatives of their own choosing." Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in" Section 7. In *CDK Contracting Co.*, 308 N.L.R.B. 1117 (1992), the National Labor Relations Board (Board) applied those statutory provisions to the construction industry and exercised its authority to "resolve conflicts between [Section] 7 rights and private property rights." *Hudgens* v. *NLRB*, 424 U.S. 507, 521 (1976). The Board concluded that a general contractor violates Section 8(a)(1) by denying a union official access to a common construction site in which the general contractor has a property interest, when the union represents employees of a subcontractor hired by the general contractor to perform work on the site, the subcontractor's labor agreement contains a union-access provision, and the union official seeks to perform representational duties on behalf of employees represented by the union. See 308 N.L.R.B. at 1121-1122. In that situation, the Board concluded that the general contractor must permit the subcontractor "to observe [its] contractual obligations." *Id.* at 1117.

The *CDK Contracting* Board further concluded that its holding in that case is consistent with this Court's decision in *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527 (1992). See 308 N.L.R.B. at 1117. In *Lechmere*, this Court reaffirmed the general rule that a property owner may validly post its property against the distribution of union literature by nonemployee union organizers, but also reaffirmed the Board's authority to grant nonemployee union organizers access to private property where the union lacks "reasonable

alternative means" of communicating with the employees (*i.e.*, where the employees are "inaccessible"). 502 U.S. at 537-538 (applying *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)). Among other considerations, the *CDK Contracting* Board explained that there are generally no "reasonable, effective alternative means" by which a union can enforce the terms of its collective-bargaining agreement with the subcontractor, absent access to the common jobsite. 308 N.L.R.B. at 1117.

2. Petitioner is a non-union general contractor in the construction industry. Pet. App. 4a, 17a, 27a, 28a. Petitioner hires union and non-union subcontractors to perform construction work. *Id.* at 4a. In 1999, petitioner was retained by Cinema Hollywood, LLC, to construct an addition to a movie complex in Birch Run, Michigan. *Id.* at 4a, 27a, 28a, 62a. Petitioner hired ten subcontractors to perform work on this construction project, including Acoustical Arts, Inc. (Acoustical), a unionized firm. *Id.* at 4a, 17a, 27a, 28a. Acoustical's carpenters were represented by Local 706 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Union). *Id.* at 4a, 17a, 29a. A term in the collective-bargaining agreement between the Union and Acoustical permitted Union representatives "access to all jobs" and "to visit the job during working hours to interview the employer, steward, or men at work," provided that the representatives "[do] not hinder the progress of the work." *Id.* at 4a-5a; see *id.* at 17a-18a, 28a. On October 13, 1999, Leon Turnwald, a Union business representative, went to the Cinema Hollywood jobsite to see how Ray Cotton, a new Acoustical employee (and Union member) was "getting along." Pet. App. 5a, 30a. An Acoustical foreman advised Turnwald that Cotton had reported for work that day, but had left the site prior to Turnwald's arrival. *Id.* at 30a, 50a n.2; see *id.* at 5a. Turnwald encountered Brian Grandy, petitioner's project superintendent, who told him to "get your business done and get out," and Turnwald left. *Id.* at

31a-32a; see *id.* at 5a. Later that day, Turnwald spoke to Cotton by telephone. Cotton told Turnwald that he had left the site because the scaffolding on which he was required to work was unsafe. *Id.* at 32a; see *id.* at 5a. Turnwald then spoke with Acoustical's owner, who told Turnwald that the scaffolding was safe. *Id.* at 5a, 32a. The following day, October 14, 1999, Turnwald returned to the jobsite to investigate the safety of the scaffolding in response to Cotton's complaint. *Id. at* 5a, 17a, 32a. Turnwald, however, was confronted by Grandy, who ordered him off the site in loud and profane terms. *Id.* at 5a, 17a, 32a-33a. Grandy also overturned a makeshift table on which a new Acoustical employee was attempting to fill out union paperwork, causing a set of tools to fall on Turnwald. *Id.* at 5a-6a, 36a-40a, 42a-44a. At that point, Turnwald left the site without checking the safety of the scaffolding. *Id.* at 6a[1].

3. Acting on a charge filed by the Union, the Board's General Counsel issued a complaint alleging that petitioner violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), on October 14, 1999, by interfering with the Union's effort to access the Cinema Hollywood jobsite pursuant to its collective-bargaining agreement with Acoustical. Pet. App. 25a-26a.

a. After a hearing, an administrative law judge (ALJ) sustained that allegation. Pet. App. 63a-65a. The ALJ concluded that the Board's decision in *CDK Contracting Co.*

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[1] Kevin Culbert was the new Acoustical employee who was attempting to fill out union paperwork on the makeshift table that Grandy overtuned. Culbert was represented by a different Carpenters local, and an official of that union, Robert Horner, accompanied Turnwald to the Cinema Hollywood site on October 14, 1999, to collect Culbert's paperwork. Pet. App. 18a n.3, 29a, 30a, 32a; see *id.* at 5a-6a, 50a, 52a, 55a. The Board found that petitioner, through Grandy, did not unlawfully interfere with "Horner's access to employees he represented," *i.e.*, Culbert, because there was "insufficient evidence" that, on October 14, 1999, a contractual union access provision was in effect between Culbert's union and Acoustical. *Id.* at 18a n.3.

"controls this case." *Id.* at 63a. Applying *CDK Contracting*, the ALJ concluded that petitioner violated Section 8(a)(1) on October 14 when Grandy "refused and otherwise interfered with" Turnwald's effort to access the Cinema Hollywood jobsite. *Id.* at 65a; see *id.* at 64a. The ALJ noted that petitioner was entitled to "impose reasonable rules" on union representatives seeking access to the jobsite, *id.* at 64a, but found that Grandy had not advised Turnwald of any such rules. *Id.* at 61a. The ALJ also found that Turnwald had not "hinder[ed] the progress of the work" during his visit. *Id.* at 64a.

b. The Board, in agreement with the ALJ, concluded that *CDK Contracting* "is controlling in this case" and that petitioner violated Section 8(a)(1) by interfering with Turnwald's access to the Cinema Hollywood jobsite "pursuant to the access provision in the Union's collective-bargaining agreement with [Acoustical]." Pet. App. 18a; see *id.* at 19a. In so concluding, the Board emphasized that the purpose of Turnwald's visit to the site on October 14 was "to investigate a safety complaint lodged by a union member who worked on the jobsite the day before," *i.e.*, Acoustical employee Cotton's complaint. *Id.* at 19a. The Board also found no merit to petitioner's contention that *CDK Construction* "conflict[s] with" *Lechmere*. *Id.* at 18a.

As a remedy, the Board ordered petitioner to permit the Union "to enter the Cinema Hollywood jobsite or any other jobsite for the purposes of representing the employees of [Acoustical] under its collective-bargaining agreement with the Union," with a proviso that petitioner "is not prevented from applying reasonable and nondiscriminatory rules pertaining to nonemployee access." Pet. App. 20a.

4. The court of appeals enforced the Board's order. Pet. App. 4a, 15a. Stressing the "reality inherent in construction work that a construction subcontractor's employees work on the property of another," the court concluded that, "[u]nder the circumstances presented here, the Board's balancing of

the conflicting interests in *CDK Contracting* is a reasonably defensible interpretation of the [NLRA]." *Id.* at 13a-14a. In so concluding, the court found that *Lechmere* is "readily distinguishable from this case." *Id.* at 13a.

The court explained that, unlike in *Lechmere*, "the union agent at issue here [*i.e.*, Turnwald] did not seek access for purposes of organizing employees * * * or other similar activity in exercise of the union's 'derivative' [Section] 7 rights." Pet. App. 13a. Rather, the court explained that Turnwald sought access to the Cinema Hollywood jobsite "as the direct representative of the subcontractor's [*i.e.*, Acoustical's] employees under the authority of the collective bargaining agreement," in which the employees had secured the benefit of "union access for purposes of investigating the premises and interviewing employees on-site." *Ibid.*

The court also rejected petitioner's contention that the *CDK Contracting* Board impermissibly held that "a general contractor is 'bound' to a contract term to which it is not a party," *i.e.*, to the access provision in the subcontractor's agreement with the union. Pet. App. 14a. Rather, the court explained, *CDK Contracting* held only that a general contractor may not invoke its property interest to interfere with "the duties of the union as representative of the subcontractor's employees." *Ibid.* The court also found sufficient evidentiary support for the Board's finding that petitioner had not conveyed any "rules for visiting the jobsite" to Turnwald. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. As this Court has explained, in a case such as this one, "the task of the Board * * * is to resolve conflicts between [Section] 7 rights and private property rights, 'and to seek a proper accommodation between the two.'" *Hudgens* v.

NLRB, 424 U.S. 507, 521 (1976) (quoting *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 543 (1972)). In such cases, the Board's "basic objective" is to fashion an "accommodation of [Section] 7 rights and private property rights 'with as little destruction of one as is consistent with the maintenance of the other.'" *Hudgens*, 424 U.S. at 522 (quoting *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)). Moreover, "[i]n each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance." *Hudgens*, 424 U.S. at 522. Because the Board's accommodation of the competing interests in the "generic situation" presented by *CDK Contracting* is reasonable, the court of appeals in this case properly afforded deference to the Board's position. Pet. App. 13a-15a; see *Hudgens*, 424 U.S. at 522-523.[2]

On the one hand, NLRA Section 7 affords protection to employees in their "invocation of a right rooted in a collective-bargaining agreement"—such as a union access provision—because invoking a contractual right is "unquestionably an integral part of the process that gave rise to the agreement." *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984). Moreover, NLRA Section 8(a)(1) affords employees of a particular employer protection from another employer's interference with their Section 7 rights. See *Hudgens*, 424 U.S. at 510 n.3. Employees of a subcontractor therefore have a legitimate interest in being protected from the general contractor's imposition of "extra-contractual restraints" that might operate to "nullify[]" important pro-

[2] The task of "effectuat[ing] national labor policy" by "striking th[e] balance" among competing interests in the work place is "often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87, 96 (1957). Deference to the Board is particularly warranted "where Congress likely intended an understanding of labor relations to guide the [NLRA's] application." *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 89-90 (1995).

visions of their collective-bargaining agreement. *CDK Contracting*, 308 N.L.R.B. at 1122 (quoting *Villa Avila*, 253 N.L.R.B. 76, 81 (1980), enforced as modified, 673 F.2d 281 (9th Cir. 1982)).

On the other hand, the general contractor has a legitimate interest in "control[ling] its property" and may not wish "to admit the union agent onto the property." *CDK Contracting*, 308 N.L.R.B. at 1121. Also, the general contractor has not agreed to the access provision in the subcontractor's labor contract and does not have a bargaining relationship with the union. Cf., *e.g.*, *NLRB* v. *American Nat'l Can Co.*, 924 F.2d 518, 524-525 (4th Cir. 1991) (finding that an employer with a labor agreement was required to allow the union access to its plant because access was necessary to ensure the union's responsible representation of employees with respect to a grievance).

The Board reasonably accommodated the competing interests by concluding that, on balance, the general contractor must permit the subcontractor "to observe [its] contractual obligations." *CDK Contracting*, 308 N.L.R.B. at 1117. First, the Board has determined that there are generally no "reasonable, effective alternative means" by which a union can enforce the terms of its collective-bargaining agreement with the subcontractor, absent access to the common jobsite. *Ibid.* In analogous circumstances, this Court has upheld the Board's authority to grant access to union agents who are not employees of the property owner. See *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 537 (1992) (Board may grant nonemployee union organizers access to private property where the union lacks "reasonable alternative means" of communicating with the employees, *i.e.*, where the employees are "inaccessible").

Second, in a case such as this one, the general contractor itself has made an affirmative business decision to hire a unionized subcontractor, rather than a non-union firm, to perform necessary construction work on the common jobsite.

That decision reflects the general contractor's economic determination that hiring a unionized firm will best achieve a successful and timely completion of the overall project. See *Villa Avila*, 253 N.L.R.B. at 81 (noting the responsibility of general contractors for assuring that "the entire * * * project * * * progresses according to a predetermined and customarily exacting schedule"). Where the general contractor has determined that hiring a unionized sub-contractor will best serve its objectives, the general contractor is ill-positioned to claim an unfettered right to deny entry to union representatives, whose periodic visits to the jobsite are an aspect of the manner and means by which the subcontractor accomplishes its work. Accordingly, the Board, balancing the conflicting interests, reasonably regards the general contractor as having "voluntarily" elected to "subject[]" its property rights to the access provision in the subcontractor's agreement with the union. *CDK Contracting*, 308 N.L.R.B. at 1117.

Third, the Board has found that the general contractor's legitimate property interests are "effectively" addressed by "common and accepted practice[s] obtaining at construction sites" with respect to access. *Villa Avila*, 253 N.L.R.B. at 81. Those practices include requirements that the union representative notify the general contractor of his presence on the site and state the nature of his visit. *Id.* at 80. The availability of such common industry practices, and of other means by which the general contractor may protect its property interests,[3] further support the Board's striking the balance

[3] For example, the general contractor may deny a union representative entry to the site if his prior conduct "reveal[s] that the stated purpose [of the visit] is pretextual," and may evict the representative if, having been permitted entry, the representative engages in improper conduct. *Villa Avila*, 253 N.L.R.B. at 80. See *CDK Contracting*, 308 N.L.R.B. at 1117 n.1 (permitting general contractor to promulgate a reasonable escort requirement).

in favor of allowing the subcontractor to honor its contractual access obligation.

2. a. In this Court, petitioner does not directly contend that the Board's accommodation of the competing interests in *CDK Contracting* is unreasonable. Rather, petitioner's primary contention (Pet. i (Question 1), 6-8, 13-14) is that the Board's accommodation of the competing interests is foreclosed by this Court's decision in *Lechmere, Inc.*, *supra*. Petitioner is mistaken.

As already discussed, see pp. 2-3, 8-9, *supra*, *Lechmere* upheld the Board's authority to grant nonemployee union organizers access to private property where the union lacks "reasonable alternative means" of communicating with the employees (*i.e.*, where they are "inaccessible"). 502 U.S. at 537. Analogously, it is permissible for the Board to give effect to the subcontractor's contractual access provision in a *CDK Contracting* scenario, where there are generally no "reasonable, effective alternative means" by which a union can enforce the terms of its collective-bargaining agreement with the subcontractor. 308 N.L.R.B. at 1117. Petitioner does not challenge that particular determination by the Board, nor could it. See *NLRB* v. *Villa Avila*, 673 F.2d 281, 283 (9th Cir. 1982) (explaining that the subcontractor's "[c]ompliance with many contract provisions can be effectively policed only on the premises where the [union] agent may observe conditions during working hours").

Even apart from the question of reasonable alternative means, there is no merit to petitioner's contention (Pet. 8, 13) that *CDK Contracting* is foreclosed by the "bright line rule" of *Lechmere* that a property owner may validly post its property against the distribution of union literature by nonemployee union organizers. 502 U.S. at 538. As the Court explained, there is a "critical distinction" between "the organizing activities of employees (to whom [Section] 7 guarantees the right to self-organization) and nonemployees (to whom [Section] 7 applies only derivatively)." *Id.* at 533.

That "critical distinction" is germane here. In a *CDK Contracting* scenario, union officials do not seek access to the common jobsite to engage in "derivative" Section 7 activity (such as organizing), but rather, to carry out their non-derivative statutory duties as the exclusive bargaining representative of the subcontractor's employees (see 29 U.S.C. 158(a)(5)). More fundamentally, giving effect to the contractual access provision furthers the employees' non-derivative Section 7 right to enjoy the benefits negotiated in their collective-bargaining agreement. See Pet. App. 13a; *City Disposal Sys.*, 465 U.S. at 831.

b. Contrary to petitioner's contention (Pet. 7, 8-12), the decision of the court of appeals in this case does not conflict with decisions of the D.C., Third, and Ninth Circuits. None of the cases relied on by petitioner addresses (much less invalidates) the Board's accommodation of the competing interests in *CDK Contracting*, and none of them involved union efforts to enforce employee rights under a collective bargaining agreement. Rather, in each of the cited cases, the court, applying *Lechmere*, concluded that nonemployee union agents were not entitled to access under Section 7 for the purpose of handbilling customers on private property.[4]

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[4] See *United Food & Commercial Workers, Local 880* v. *NLRB*, 74 F.3d 292, 293-294 (D.C. Cir.), cert. denied, 519 U.S. 809 (1996) (cited at Pet. 7, 9) (agreeing with Board that nonemployee union agents may not enter the property of retail stores to picket and distribute literature to potential customers urging them to shop elsewhere; "Under the established case law, it would make no sense to hold that nonemployees have a greater right of access when attempting to communicate with an employer's customers than when attempting to communicate with an employer's [unorganized] employees."); *Metropolitan Dist. Council of Philadelphia & Vicinity United Bhd. of Carpenters* v. *NLRB*, 68 F.3d 71, 74 (3d Cir. 1995) (cited at Pet. 7, 11) (agreeing with Board that non-employee union agents may not enter the property of a condominium development to distribute area-standards handbills to prospective purchasers; "We can conceive of no reason why this policy would be any less compelling in a case in which a union was engaged in area standards

No such consumer-oriented activity is involved here. Moreover, the court of appeals' opinion in this case makes clear that, insofar as handbilling of customers is concerned, the Sixth Circuit is in agreement with the D.C., Third, and Ninth Circuits. See Pet. App. 12a (discussing Sixth Circuit precedent applying *Lechmere* to deny nonemployee union agents access to distribute area-standards and other handbills to customers on store property).[5]

c. The court of appeals' decision does not create a "legal morass" (Pet. 14) for general contractors. For example, although petitioner contends (Pet. 15) that it is "nearly impossible" for construction managers to determine the reason for the union representative's visit to the jobsite, general contractors may require union officials to state the nature of their business. See Pet. App. 20a (Board's order permits petitioner to "apply[] reasonable and non-discriminatory" access rules). Petitioner also contends (Pet. 16) that the union representative may seek access to the site for "dual purpose[s]," one of which is not legitimate (such as to organize unrepresented employees of another employer).

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handbilling than in a case where the union was engaged in direct organizational activity."); *Sparks Nugget, Inc.* v. *NLRB*, 968 F.2d 991, 997-999 (9th Cir. 1992) (cited at Pet. 12) (reversing Board's pre-*Lechmere* grant of access claim for nonemployee union agents to handbill and picket the general public, including potential customers, on hotel property).

[5] Petitioner errs in suggesting (Pet. 10 n.4) that the court of appeals' decision in this case conflicts with *New York New York, LLC* v. *NLRB*, 313 F.3d 585 (D.C. Cir. 2002). In that case, the court did not address the Board's *CDK Contracting* position. Rather, the court remanded to the Board for further consideration a series of questions respecting whether, and to what extent, off-duty employees of an employer that leases space inside a hotel/casino complex have a Section 7 right to distribute organizational literature inside the complex but beyond their employer's leasehold. See *id.* at 590. The court made clear that "[n]o Supreme Court case" (including *Lechmere*) resolves the remanded issues. *Ibid.*

But a representative who engaged in illegitimate conduct on the site would be subject to eviction. See p. 11 note 4, *supra.*

3. Petitioner errs in contending (Pet. 17-18) that the court of appeals' decision "imposes the terms of a subcontractor's union contract on a non-party employer" and therefore conflicts with decisions of this Court (and several courts of appeals) that apply the principle of "privity of contract." As the court of appeals correctly explained (Pet. App. 14a), *CDK Contracting* does not "bind" the general contractor to the subcontractor's labor agreement. Rather, *CDK Contracting* reflects the Board's reasonable judgment that, on balance, the competing interests are best accommodated if —having hired a unionized subcontractor and admitted its workers to the common jobsite to perform necessary work— the general contractor is prohibited from interfering with the subcontractor's obligation to honor the access provision in its employees' labor agreement. The cases cited by petitioner (Pet. 17-18) do not address (much less decide) whether the Board may strike the balance of interests in that fashion.[6]

The court of appeals' decision does not hold petitioner "hostage" to a contractual term about which it was "completely unaware." Pet. 21 & n.9. Petitioner's contention is based on the testimony of Brian Grandy, its project superintendent at the Cinema Hollywood jobsite, to the effect that he had not seen any of the subcontractors' collective-bargaining agreements. See Pet. App. 31a, 78a. It was Grandy's

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[6] Petitioner's reliance (Pet. 17-18) on *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), is misplaced. In *Burns*, the Court held that, although a successor employer is not bound to observe the terms of a collective-bargaining agreement between the union and the predecessor employer (*id.* at 281-282), the successor nonetheless may have a legal duty to recognize and bargain with the union (*id.* at 277-281). Accordingly, to the extent that it is germane, *Burns* lends support to the Board's conclusion in *CDK Contracting* that a general contractor may have a legal duty toward the union and employees it represents (*i.e.*, to refrain from interfering with contractual rights), even though the general contractor is not a party to the union's agreement with the subcontractor.

own profane and confrontational behavior toward Turnwald on October 14, 1999, however, that prevented Grandy from learning that Turnwald was seeking access pursuant to Acoustical's labor agreement for the purpose of investigating the safety of Acoustical's scaffolding in response to an Acoustical employee's complaint. See Pet. App. 5a, 17a, 19a, 32a-33a, 36a-40a, 42a-44a. In any event, Grandy's personal knowledge is not material. Under settled law, a general construction contractor that hires a unionized subcontractor is placed on constructive notice of that subcontractor's union access provision. See *C.E. Wylie Constr. Co.*, 295 N.L.R.B. 1050, 1050 (1989), enforced in part and remanded in part on other grounds, 934 F.2d 234 (9th Cir. 1991); *CDK Contracting*, 308 N.L.R.B. at 1124. Petitioner does not challenge that notice principle.

Finally, there is no merit to petitioner's contention (Pet. 22 n.10) that, because petitioner could have lawfully terminated its subcontract with Acoustical, it was also free to "disregard" the access provision in Acoustical's agreement with the Union. That argument rests on a non sequitur. Under the NLRA, an employer may lawfully cease doing business with another employer "because of the union or nonunion activity of the latter's employees." *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry (Malbaff Landscape Constr.), Local No. 447,* 172 N.L.R.B. 128, 129 (1968). But it does not follow that an employer that continues to do business with another employer is free to prevent the latter from honoring a contractual obligation in its labor agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. The National Labor Relations Board seeks to impermissibly bypass application of Lechmere's inaccessibility rule based on the incorrect assumption that there are generally no reasonably effective means by which non-employee union officials can enforce the terms of collective bargaining agreements covering employees of subcontractors working on construction jobsites managed by general contractors.

In its "Brief for the National Labor Relations Board in Opposition," the National Labor Relations Board ("NLRB" or "Board") buttresses its arguments against Wolgast Corporation's Petition for a Writ of Certiorari with inapplicable case law and untenable rationale. In particular, the NLRB erroneously claims that Wolgast cannot challenge what the NLRB purports to be an established legal rule that union officials have no reasonably effective alternative means for policing labor contracts of subcontractors other than by direct access to the property upon which the work of union members is performed. Wolgast can and does challenge that claim. Accordingly, Wolgast submits this Reply Brief as rebuttal to the NLRB's faulty propositions and as additional assistance to this Court in properly resolving the issues presented in Wolgast's Petition for Writ of Certiorari.

In its Brief, the NLRB has presented a defense of existing Board law concerning construction site union access as understood by the Board and the Sixth Circuit Court of Appeals. It contends that CDK Contracting, 308 N.L.R.B. 1117 (1992), in which the Board ruled private property rights of a general contractor must give way to the contractual union access rights found in a subcontractor's labor agreements, strikes a proper balance between the Section 7 rights of

employees and the property interests of general contractors. The NLRB also argues that precedent from CDK Contracting is not in conflict with this Court's opinion in Lechmere v. NLRB, 502 U.S. 527 (1992), where this Court held that an employer may lawfully exclude non-employee union officials from its property absent a showing by the union that the employees with whom the union officials desire contact are otherwise inaccessible.[1]

Throughout its argument, the NLRB repeatedly refers to what it believes is an established legal precept; namely, that "there are generally no 'reasonable, effective alternative means'" by which union officials can enforce the terms of labor agreements maintained with subcontractors working on construction sites unless contractual access provisions are enforced on those jobsites irrespective of the general contractors' property rights.[2] (See Brief in Opposition, pages 3, 8 and 10). Apparently, the NLRB contends that the "heavy burden" placed on union officials to show employee inaccessibility under the Lechmere inaccessibility rule[3] is automatically met where there is a contractually enforceable union access provision with any employer on a multi-employer worksite. The NLRB goes so far as to state

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[1] Significantly, every case cited by the NLRB as support for its position that CDK Contracting is controlling law *predates* Lechmere.

[2] As support, the NLRB references a Ninth Circuit case decided a decade before Lechmere, NLRB v. Villa Avila, 673 F.2d 281 (9th Cir. 1982).

[3] The inaccessibility rule was first enunciated by the Supreme Court in NLRB v. Babcock and Wilcox Co., 351 U.S. 105 (1956) and reinstituted by the Court in Lechmere.

at page 10 of its Brief that "[Wolgast] does not challenge that particular determination by the Board, nor could it." In fact, Wolgast does challenge this alleged "determination" as having no basis in fact or in law.

As an initial matter, Lechmere did not hold, nor does Wolgast contend, that unionized employees should be without representation while on the private property of another employer. Lechmere simply does not address that issue. Instead, Lechmere speaks to the limited rights of non-employee union officials seeking access to private property rights of employers. Lechmere reaffirmed the rule that, absent employee inaccessibility, an employer cannot be compelled to allow non--employee union officials access to the workplace. This Court held at 537:

> . . . § 7 speaks to the issue of nonemployee access to an employer's property. Babcock's teaching is straightforward: §Section 7 simply does not protect non-employee union organizers *except* in the rare case where "the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels," 351 U.S. at 112. (Emphasis in original).

In an effort to circumvent Lechmere, the NLRB assumes as a matter of law that only non-employee union officials can adequately protect collectively bargained rights of employees and that, therefore, there are no alternative reasonable effective means to enforce the terms of collective bargaining agreements covering employees of subcontractors working on construction jobsites managed by general contractors. There simply is no basis for the rule the NLRB espouses. As an initial matter, it is significant that neither the Charging Party, the Board nor the Sixth Circuit has ever contended or

determined that the subcontractor's employees were "inaccessible" absent non-employee union officials' entry to the jobsite. Thus, the Board is substituting a presumption for what is supposed to be the union's "heavy burden" of proof. The fact is that the vast majority of "union business" can easily be conducted with employees off-site. Indeed, in the present case, the subcontractor and union officials discussed various aspects of an employee's safety concern by telephone after work the day before the union officials sought access to the jobsite (Pet. App. 5a). Moreover, the union officials testified they initially sought access to the jobsite merely to check on a couple members and to see how a new member was getting along (Pet. App. 5a, 30a). The union officials sought access the following day, in part, to "sign up a new lather" (Pet. App. 5a, 32a, 52a). Union officials have ready access to employees outside of working hours and certainly can perform "business" such as this off-site, which, in fact, they did.[4]

Even where union officials believe certain information is needed to "police" a labor agreement, the policing can be performed through investigations and reports from employees who serve as trained union stewards.[5] In the present case, the

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[4] One of the union officials testified that he met with an employee off-site the same day the employee had walked off the jobsite for what the employee thought was an unsafe scaffold (Pet. App. 51a).

[5] Union stewards are bargaining unit employees, trained by the union to be the "eyes and ears" of the union and are responsible for processing employee grievances (including investigations) and for handling other day-to-day contract administration. According to the NLRB in a case involving justification of "super-seniority" for stewards relative to layoff and recall, "it is the immediacy of attention that stewards can offer that place the stewards in such a

collective bargaining agreement found to be legally effective by the administrative law judge contained a union steward article devoted to the selection, duties and rights of union stewards, as is common in labor contracts. It read in pertinent part:

> The Employer agrees that there shall be a Journeyman working Steward on the job at all times when Carpenters are working who shall report any violation of the Agreement and perform the usual duties of the Steward with the least interference to the job. (Pet. App. 28a, 29a).

The record reveals that union officials utilized the union steward of the subcontractor working on the Wolgast jobsite for various tasks, including as a communication link with other employees relative to safety issues and routine union administrative recordkeeping (Pet. App. 50a).

Even if union stewards are not available, an employee always has access to the grievance and arbitration provisions of the collective bargaining agreement for alleged violations of the agreement (Pet. App. 28a, 29a). Similarly, if an employee believes an "abnormally dangerous condition" exists, he is protected under federal law pursuant to 29 U.S.C. 143 should he choose to walk off the job and discuss it with his union. This option is not merely hypothetical, as the record in the present case reveals that a unionized employee did, in fact, walk off the job due to his belief that a scaffold was unsafe (Pet. App. 5a, 32a, 47a, 51a). Contrary to the NLRB's assertion in its Brief, there are

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special position." Gulton Electro-Voice, Inc., 266 N.L.R.B. 406, 408 (1983).

numerous, concrete facts and circumstances demonstrating why compliance with contract provisions can be effectively monitored and protected without direct access to the jobsite by non-employee union officials. Finally, Lechmere's inaccessibility rule adequately protects union access interests on a case-by-case basis where union officials can demonstrate a specific need for access to otherwise inaccessible employees while on the property under control of the general contractor.

The NLRB is simply wrong in its contention that non-employee union officials seeking to police a collective bargaining agreement can do so effectively only if granted access to construction jobsites. Furthermore, there is no universal rule adopted by the NLRB and approved by the federal courts which gives union officials an automatic pass onto the property of a general contractor on the basis that there are, as a matter of law, no effective alternative means of policing a labor contract in such circumstances. Accordingly, the NLRB's apparent contention that union officials always meet Lechmere's inaccessibility standard in construction industry access cases should be rejected by this Court.

Respectfully submitted,

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WOLGAST CORP.,

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v.

NATIONAL LABOR RELATIONS BOARD,

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On Petition for a Writ of Certiorari to the
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BRIEF OF AMICUS CURIAE ASSOCIATED BUILDERS AND CONTRACTORS, INC. IN SUPPORT OF PETITIONER

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No. 03-883

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BRIEF OF AMICUS CURIAE ASSOCIATED BUILDERS AND CONTRACTORS IN SUPPORT OF PETITIONER[1]

INTEREST OF THE AMICUS CURIAE

Associated Builders and Contractors, Inc. ("ABC") is a national trade association representing

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[1] Pursuant to Supreme Court Rule 37.2(a), all parties have given written consent to the filing of this Brief. Letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, the Amicus states that this brief was not prepared, written or produced by any person or entity other than the Amicus or its counsel.

more than 23,000 individual employers in the construction industry. ABC's membership includes both union and non-union employers and both general contractors and subcontractors. Many years of interaction between its subcontractor and general contractor membership renders ABC uniquely qualified to address the legal confusion and practical implications of the decisions of the NLRB and the Sixth Circuit in this case.

ABC's members have a strong interest in uniform enforcement of labor laws, particularly with regard to controlling jobsite access in the manner set forth by this Court in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). The *Lechmere* decision established a bright-line rule that a non-employee union agent does not have a right of access to an employer's property, except in those cases where employees are otherwise inaccessible.

The decisions of the NLRB and the Sixth Circuit in the present case depart from the *Lechmere* rule in a manner that creates a significant split of authority among the circuits on an issue of great public importance. Of particular concern to ABC, the decisions below are likely to cause tremendous confusion and upheaval in the construction industry because they disrupt long settled understandings about the right of general contractors to control jobsite access in the construction industry in general, and subcontractor access in particular.

The project-oriented and highly specialized nature of construction work necessitates the substantial use of contractor-subcontractor relationships. At each

work location, a general contractor may have large numbers of subcontractors (both union and non-union) working on various aspects of the construction project. Forcing contractors to allow union agents free run of the contractors' work sites, based solely on provisions in subcontractors' collective bargaining agreements to which the general contractors are not parties, and of which such contractors may not even be aware, unfairly diminishes the contractors' property rights in contradiction to the *Lechmere* rule. In addition, allowing such unfettered access would likely create worksite confusion and lead to potential safety and liability issues which general contractors have the legal right (and legal duty) to control.

Because of these potential problems, as further explained below, amicus ABC strongly supports the Petition for Writ of Certiorari in this case. The decisions of the NLRB and the Sixth Circuit decision will cause serious harm to the construction industry. The Court should grant the Petition and reverse the decisions below in order to resolve the conflicts created by them with *Lechmere* and its progeny in other circuits.

ISSUES

The Amicus hereby adopts and incorporates by reference the Petitioner's Questions Presented for Review.

STATEMENT OF THE CASE

The Amicus hereby adopts and incorporates by reference the Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

The Petition should be granted in order to resolve a significant and direct conflict between the decisions of the NLRB and the Sixth Circuit and this Court's *Lechmere* decision, as interpreted by numerous other Circuit Courts of Appeals.

The Board and Sixth Circuit decisions ignore and threaten to disrupt long-settled understandings between general contractors and subcontractors in the construction industry with regard to jobsite control. Absent some explicit agreement to the contrary, subcontractors who enter onto a worksite at the invitation of a general contractor do so pursuant to the general contractor's overall responsibility for and control over the jobsite. In particular, it is the general contractor's right and duty to maintain jobsite security and to decide who will be granted access to the jobsite so as not to interfere with the progress of the work. The subcontractor is not free to enter into third party agreements that subordinate the general contractor's

rights and responsibilities, absent clear authorization from the general contractor to do so.

The Petitioner in this case, like most general contractors, had no knowledge of the contents of its subcontractors' union agreements, was not party to any such agreements, and cannot legally be bound by them. By subordinating the general contractor's property rights to the interests of the subcontractor's third party agreement with the union, the decisions below stand on their head settled norms of business conduct in the construction industry as well as fundamental principles of privity of contract.

As a result, the decisions under review directly conflict with this Court's decision in *Lechmere* and later circuit court of appeals cases. Other circuits have repeatedly held that non-employee union agents have no right under the NLRA to gain access to an employer's premises, absent proof that no reasonable alternative means of access to employees exist. The distinction drawn by the Sixth Circuit between "organizational" and "representational" access violates this Court's precedent and ignores the realities of the construction industry. In any event, there is no support for the Sixth Circuit's ruling that the property rights of general contractors are abrogated by a subcontractor's previously unknown and unseen union agreements.

The decisions of the NLRB and the Sixth Circuit create an unworkable and unwarranted expansion of union access rights involving union subcontractors that is in direct conflict with this Court's *Lechmere* decision and the decisions of other circuit courts of appeals. To resolve this important conflict, and to reaffirm the

Court's decision in *Lechmere*, the Petition should be granted and the decisions of the NLRB and the Sixth Circuit reversed.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE LECHMERE DECISION IN A MANNER WHICH WILL CAUSE CONFUSION AND UPHEAVAL IN THE CONSTRUCTION INDUSTRY.

By granting enforcement to the NLRB's decision, the Sixth Circuit determined that the Petitioner, a general contractor in the construction industry, violated the Act by restricting access by non-employee union agents to a construction jobsite that was indisputably under the general contractor's possession and control. The sole basis for the holdings of the Board and the court of appeals was that a collective bargaining agreement existed between the union and a *subcontractor* that somehow abrogated the general contractor's property interests and entitled the union agents to gain access to the general contractor's premises, over the general contractor's objection.

It is undisputed that the Petitioner in this case had no knowledge of the contents of its subcontractor's union agreement, was not party to any such agreement, and was not legally bound by it. Yet the direct result of the decisions below is to subordinate the general contractor's property rights to the interests of the subcontractor's third party "access" agreement with the

union, in a manner contrary to settled law in the construction industry.

General contractors in the construction industry typically hire subcontractors on the basis of their ability to perform high quality work at efficient prices, regardless of labor affiliation. It is estimated that 80% of all construction work in this country is performed on such an "open" or "merit" basis (as opposed to all-union projects). As a practical matter, general contractors have no way of knowing what contractual arrangements their subcontractors have entered into for the acquisition of labor services, nor do they have any interest in knowing. The general contractor's sole concern is that the subcontractor be prepared to perform the work required, subject to the terms and conditions spelled out by the general contractor in the agreement by which the subcontractor is hired.

It is fundamental that a subcontractor enters onto a jobsite to perform work on the general contractor's terms, not vice versa. This is made clear in the American Institute of Architects (AIA) Standard Contract Documents that form the basis for the vast majority of construction arrangements for work performed throughout the United States. Article 3 describes the general contractor's role on a construction project as follows:

> 3.5 Supervision and Construction Procedure
> 3.5.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have

> control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters.
> ***
> 3.5.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors.

See AIA Standard Contract Documents, reprinted in Stein, *Construction Law*, Appendix (Matthew Bender 2003). *See also, Thill v. Modern Erecting Co.*, 136 N.W. 2d 677 (Mich. 1965)(general contractor on a construction site is regarded as the "possessor" of the land); *Mihlader v. Barton Co.*, 2001 WL 738896 (Mich. Ct. App. June 29, 2001).

It is undisputed that the Petitioner contractor in this case was not a party to any collective bargaining agreements between its subcontractor and the union, and the Petitioner in fact had no knowledge of the specific provisions or even the general applicability of the agreements. Yet pursuant to the decisions below, Petitioner's rights to control access to its job site have been subordinated to the subcontractor's third party agreement.

These decisions create a serious conflict with long standing interpretations of contract law by this Court and other judicial decisions. As the Sixth Circuit itself once recognized: "Under general principles of contract law, it is axiomatic that courts cannot bind a non-party to a contract, because that party never agreed to the terms set forth therein." *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 460 (6th Cir. 1999). That holding was derived from numerous decisions of this Court to the same effect. *See NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972) (successor employer not bound to predecessor's collective bargaining agreement, absent consent by the successor to be bound by it); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Sheldon Co. Profit Sharing Plan & Trust*, 858 F. Supp. 663, 670 (W.D. Mich. 1994) ("The terms and conditions of a contract may not be enforced against a person not a party to it.").

Specifically with regard to the separate contractual status of contractors and subcontractors in the construction industry, other circuits have held that third party contracts entered into by one contractor are not binding on another. *See Cariaga v. Local No. 1184 Laborers Int'l Union of N. Am.*, 154 F. 3d 1072 (9th Cir. 1998) (memorandum opinion) (arbitration procedure in general contractor's labor agreement with union does not apply to subcontractor, where subcontract fails to clearly and unequivocally incorporate by reference the arbitration procedure, and does not state that the contractor agreed to be bound by any collective bargaining agreement between contractor and the union); *see also Interstate Striping, Inc. v. LIUNA*, 1998 U.S. App. LEXIS 22694 (9th Cir. 1998)(same); *Slaught v. Bencomo Roofing Co.*, 25 Cal. App. 4th 744,

748 (Cal. App. 1994) (although parties may validly incorporate by reference into their contract the terms of another document, "reference to the other document must be clear and unequivocal and the terms of the incorporated document must be known or easily available to the contracting parties").

The principal NLRB case relied on by the decisions below to achieve their contrary result, *CDK Contracting*, 308 N.L.R.B. 1117 (1992), itself conflicted with this Court's *Lechmere* holding and basic construction law principles. Thus, in *CDK*, the NLRB concluded that a contractor subjected its property rights to a subcontractor's third party "union access" agreement, solely because the contractor "invited" subcontractors onto the jobsite. Yet it has long been recognized in the common law that invitees remain subject to the control of those who have invited them, and that invitees are not free unilaterally to expand their license to include unauthorized third parties. *Thompson on Real Property* ¶ 64.04(a)(1994).

If the Sixth Circuit's decision in the present case is allowed to stand, thereby subjecting general contractors to third party contractual obligations of their subcontractors, general contractors will face significant liability and safety issues in attempting to control their worksites. For example, general contractors have the statutory responsibility for the safety of all persons on the job site. *See, e.g.*, OSHA Regulation 29 C.F.R. § 1926.16 ("[T]he prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, whether or not he subcontracts any part of the work."). It would not be fair or just to first burden a general

contractor with the contractual responsibility for overall jobsite safety and then to take away the corresponding right to control access to the site.

In fact, it is likely that the decisions of the NLRB and the Sixth Circuit would force many general contractors to reevaluate their business relationships with unionized subcontractors. It is well settled that a contractor can refuse to do business with a subcontractor altogether merely because the subcontractor is party to a union agreement. *See Local No. 447, United Assn. of Journeymen and Apprentices of the Plumbing & Pipefitting Industry*, 172 NLRB 128 (1968).

Forcing contractors to be bound by their subcontractors' collective bargaining agreement provisions, to which the contractors themselves are not even parties, would detrimentally interfere with the contractor-subcontractor relationship. The accepted norms of the industry would be disrupted and contractors would often be left with a difficult choice: either refuse to do business at all with unionized subcontractors, or accept duties, liabilities and limitations for which the contractor never negotiated and received nothing in return. This is an unprecedented reversal of longstanding industry relationships and settled contract law.[2]

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[2] Under the Sixth Circuit's holding, any signatory to a labor agreement who is "invited" onto the contractor's property for any reason would arguably bring with them the entire contents of their particular collective bargaining agreement, to be applied to the contractor's work site. No statutory basis exists to allow subcontractor agreements with third parties to override such standard jobsite requirements as security (sign-in) procedures,

In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), this Court held that, "by its plain terms, the NLRA confers rights only on *employees*, not on unions or their non-union organizers." 502 U.S. at 532 (emphasis in original). The Court then applied this distinction to reaffirm that, where reasonable alternative means of access exist, the guarantees of Section 7 do not authorize access to a work site by nonemployee union agents, even under "reasonable" regulations established by the NLRB. *Id.* at 537 (citing with approval *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)). *Lechmere* has been uniformly interpreted by numerous courts as a bright-line rule dictating nonemployee union agents' access rights to employers' property -- regardless of the union's alleged justification.

In the present case, the Sixth Circuit's decision is premised on limiting the *Lechmere* holding to cases involving "organizational," as opposed to "representational" union activities. As pointed out in the Petition, however, numerous other circuits have repeatedly rejected any such distinction. Thus, in *United Food and Commercial Workers v. NLRB*, 74 F.3d 292, 297 (D.C. Cir. 1996), the D.C. Circuit stated: "*Babcock* establishes (and *Lechmere* reaffirms) a **general rule** under which an employer may deny access

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hard hat rules, clean-up requirements, accommodations for the disabled and many more. Until now, it had been understood that the general contractor set the rules for the project, certainly regarding such basic policies as jobsite security, and all subcontractors and their employees agree to work under the general contractor's (or construction owner's) jobsite conditions. The decisions below plainly upset this equilibrium.

to non-employees seeking to trespass on the employer's property. *Id.* at 297 (emphasis added). The court further observed: "[A]lthough Babcock and Lechmere were organizational cases, the reasoning therein is equally applicable in any situation where the exercise of a section 7 right requires communication of a message to a target group."

The Third Circuit similarly refused to adopt the interpretation of *Lechmere* now espoused by the Sixth Circuit. In *Metropolitan District Council of Philadelphia and Vicinity United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. NLRB*, 68 F. 3d 71 (3d Cir. 1995), the Third Circuit rejected the union's attempt to create a distinction between direct and derivative rights in section 7. The court stated: "We decline to read *Lechmere* so narrowly. The question is not whether the right is described more aptly as direct or derivative, but whether the private property rights of an employer must give way to the rights of non-employee interlopers." 68 F.3d at 75.

Finally, the Ninth Circuit has stated that "[t]he only analysis we are allowed to make under *Lechmere* is to determine whether "non-employee union organizers have reasonable access to employees outside an employer's property." *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 997 (9th Cir. 1992). Again, this holding conflicts with the Sixth Circuit's decision in the present case.

These uniform holdings in other circuits regarding the scope of *Lechmere* all contradict the underlying premise of the Sixth Circuit's decision that

Lechmere should somehow be limited to the context of union organizing. *Lechmere* created a bright-line rule that has effectively guided employers, unions and courts in determining non-employee union access rights to employer property. The distinction drawn by the Sixth Circuit in this case between "organizational" and "representational" rights is legally untenable and practically unworkable.

The impact of the Sixth Circuit's decision on the construction industry could be drastic. The decision departs from *Lechmere* and from the consistent analysis and interpretation by other courts of appeals. The Petition should therefore be granted and the decision of the Sixth Circuit reversed.

CONCLUSION

For each of the reasons set forth above and in the Petition itself, the Amicus asks that the Petition be granted and the decisions of the Sixth Circuit and the NLRB be reviewed and set aside.

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